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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

PAMELA HOUSTON, *Petitioner,*

V.

ALL SAINTS HEALTH SYSTEM, INC.,
JENNY McNEIL, AND DR. KENNETH PEARCE,
Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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60 pp

QUESTIONS PRESENTED

QUESTION NO. ONE

Whether a hospital is liable for the conduct of a staff physician who practices racial and sexual discrimination in the hospital workplace and whether staff physicians are agents of the hospital under Title VII of the Civil Rights Act of 1964.

QUESTION NO. TWO

Whether in a discriminatory abusive environment case the reprimand of a staff physician by a hospital nurse supervisor constitutes prompt remedial action under Title VII.

QUESTION NO. THREE

Whether immediate supervisors and agents of the employer are individually liable for racial discrimination and sexual harassment under title VII of the Civil Rights Act of 1964.

QUESTION NO. FOUR

Whether summary judgment is a proper procedure for deciding the nebulous questions of motivation and intent in Title VII cases, and in particular the question of whether an employers articulated reason for discrimination is legitimate or pretext, and does such procedure deprive the employee of right to trial by jury.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

PAMELA HOUSTON, *Petitioner*,
v.
ALL SAINTS HEALTH SYSTEM INC., JENNY McNEIL and DR. KENNETH PEARCE, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Pamela Houston respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., infra, 1a) is unreported.

The order, memorandum opinion and judgment of the district court (App., infra, 16a) is unreported.

The determination of the city of Fort Worth Human Relations Commission (App., infra, 28a) is unreported.

The EEOC Notice of Right to Sue (App., infra, 31a) is unreported.

JURISDICTION

The court of appeals entered its judgment denying petitioner's motion for rehearing on June 12, 1995. (App., infra, 15a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter-

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in § 2102 of Title 5), or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under § 501(c) of Title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents,) shall not be considered employers.

42 U.S.C. § 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms,

conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-3. Other unlawful employment practices

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

29 C.F.R. § 1604.11 Sexual harassment

(a) Harassment on the basis of sex is a violation of § 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment

decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case by case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as an "employer"), is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the

Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.

(f) Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

Rule 56 of the Federal Rules of Civil Procedure

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall

be made on personal knowledge, shall set forth such facts as would be admissible in evidence, shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

United States Constitution,
Amendment Seven

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

STATEMENT

Petitioner, a black female nurse sued her employer, All Saints Hospital, the hospital's surgery supervisor, Jenny McNeil and the hospital's chief of anesthesiology, Dr. Kenneth Pearce, for racial and sexual harassment and discrimination. The district court dismissed as to Respondent McNeil on the ground that supervisors are not liable under Title VII, and granted motions for summary judgment as to the hospital and Dr. Pearce. The Fifth Circuit affirmed.

A. Sexual and Racial Harassment

Pamela Houston, a black female registered nurse, was employed by All Saints Hospital in its surgery department. The hospital contracted its anesthesiology services to a corporation run by Dr. Kenneth Pearce, a Caucasian physician. Dr. Pearce was on the hospital staff and held the position and title of "Chief of Anesthesiology". He employed more than fifteen nurse anesthetists to assist him at the hospital, and he ran the surgery schedule. Houston was instructed that she was to follow Dr. Pearce's orders. She had also been told that he could have her fired.

Upon being introduced to Dr. Pearce by her supervisor in 1984, he said to Ms. Houston; "Gee you're pretty, have you ever made love to a white man?" Thereafter, and throughout her employment, Plaintiff was subjected to repeated racial and sexual jokes, epithets and slurs by Dr. Pearce in her workplace such as: "I looked for you a good white nurse, but the best I could do was this black one." He would shuffle down the hallway and say, "Is'a commin' master". He would ask black employees: "What are y'all doing working today? You should be home eating barbecue, watermelon and drinking red soda water..." "Why aren't you out marching for John Wylie Price?" He said to Ms. Houston: "Pam, if you were a slave, I would buy you"; "You know how your black men are, they all like p-u-s-s-y"; and "Gee, you have pretty titties". Dr. Pearce would hug Ms. Houston in the hallway and say: "can you feel it? It is down to your knees". Petitioner testified in detail by affidavit and deposition that Dr. Pearce's conduct interfered with her work and created an offensive and hostile work environment. Petitioner also testified that McNeil and nurse director Geraldine Petersen were aware of and had knowledge of Dr. Pearce's habit of making sexual and racial jokes and epithets at the hospital. In her deposition McNeil admitted that Dr. Pearce did make racial and sexual jokes in

the workplace and that she had heard him make sexual comments to nurse director Petersen. Petitioner testified that she was humiliated and hurt by Dr. Pearce's conduct but that she was afraid to say anything to her supervisors.

In July 1991, Petitioner reported to supervisor McNeil that two female patients had complained to her about Dr. Pearce's conduct and that she was tired of it. McNeil, with the concurrence of nurse director Petersen then met with Dr. Pearce and "counseled" him against making racist comments to Petitioner. The hospital took no other action against Dr. Pearce, and took no further steps to eliminate discrimination in the surgery department. Following the meeting with McNeil, Dr. Pearce ceased making racist comments directly to Petitioner, but continued to engage in sexual and racial jokes and comments in the workplace.

On October 15, 1991, Plaintiff filed her EEOC charge complaining of All Saints Hospital, Jenny McNeil, and Dr. Kenneth Pearce. All Saints, notified the Fort Worth Human Relations Commission that it would not consider a negotiated settlement because Dr. Pearce was "not an employee of All Saints Hospital." On June 3, 1993, the Fort Worth Human Relations Commission issued its determination letter finding that All Saints, McNeil and Dr. Pearce had discriminated against Pamela Houston and invited the parties to join with the Commission to eliminate unlawful employment practices. (App., infra, 30a).

The following week, on June 11, 1993, the hospital gave Petitioner formal notice that her employment had been terminated.

B. Discrimination

Petitioner worked in the surgery "holding room" on the 7:00 a.m. to 3:00 p.m. shift. Most surgeries were performed during this shift. Her job was to complete charts and prepare patients for surgery. The hospital orderlies were

to transport these patients to the operating rooms, which were some distance from the holding room. The orderlies at All Saints Hospital are predominately white males. In May 1991, McNeil changed Petitioner's job duties by ordering her to transport all surgery patients from the holding room into the operating rooms without assistance from the orderlies or other nurses.

Petitioner testified that "no other male, female, Caucasian, any other race or nationality was pulled out of their job description, (7:30) cases, to push stretchers other than myself". The hospital's explanation for this disparate treatment was that it would speed delivery of the patients into surgery. Petitioner's testimony and other evidence indicated that it would not.

Ms. Houston was the only nurse assigned to the holding room. She could not prepare patients for surgery, complete their charts, and push all occupied stretchers, unassisted, into the surgery suites, and effectively speed up delivery. Petitioner protested being removed from her nursing duties to transport patients and asked for an explanation. McNeil's only reply was, "Because I want you to do it."

Petitioner pushed patient stretchers daily as ordered by her supervisor McNeil. She suffered a back strain on May 31, 1991, and was given a doctor's recommendation to continue her duties but to have assistance with transporting stretchers if needed. However, McNeil did not assign anyone to a assist her. On August 21, 1991, she re-injured her back while pushing stretchers and was unable to return to work.

Petitioner filed a workers' compensation claim and in March of 1993, the Texas Workers' Compensation Commission Appeals Panel entered a decision supporting Petitioner's injury. As stated, in June 1993, All Saints terminated Petitioner's employment.

C. Proceedings Below

Petitioner filed suit in the district court of Tarrant County, Texas alleging discrimination, abusive work environment, constructive discharge, and that she was terminated because of her workers' compensation claim and her EEOC charges. Petitioner sought damages, and equitable relief.

The state court suit was removed to the federal district court pursuant to 28 U.S.C. § 1331.

The parties completed discovery on September 12, 1994. Petitioner demanded a jury and trial was set for November 7, 1994. On August 31, 1994, the Respondents filed motions for summary judgment. As relevant here they alleged: "C. As Dr. Pearce was not an agent, representative or employee of All Saints, All Saints cannot be held responsible for his actions;" "D. Defendants are entitled to summary judgment as to Plaintiff's race harassment claims as Defendants took prompt remedial action to protect the Plaintiff;" "E. Defendants are entitled to summary judgment as to Plaintiff's claim that she was discriminated against by being forced to push occupied stretchers as Defendants had a nonpretextual, legitimate business reason for requiring such;." In compliance with Rule 56(e), F.R.C.P. Petitioner on September 22, 1994, filed her response to the motions for summary judgment supported by her affidavit and excerpts from her deposition and the deposition of McNeil. Petitioner set forth specific and detailed facts about Dr. Pearce's authority and conduct in the workplace. Petitioner testified unequivocally that Dr. Pearce continued to make sexual and racial comments in the workplace after the "reprimand". Petitioner testified in detail about her job duties and the disparate treatment by McNeil in ordering her to push stretchers for the orderlies, and that requiring her to transport the patients would not speed up delivery of patients into the

operating rooms. Documentary evidence supported Petitioner's testimony that it was the orderlies' job to transport patients and that Petitioner's performance evaluations required her to spend more time in the holding room completing charts. Petitioner detailed Dr. Pearce's racial and sexual conduct from 1984 to August 21, 1991, and identified witnesses she intended to call as to Dr. Pearce's conduct both before and after Petitioner left the hospital in August of 1991.

On October 7, 1994, the district court, without fixing a date for a hearing, and without hearing argument from counsel, granted summary judgment holding that the "reprimand" of Dr. Pearce by nurse McNeil constituted prompt remedial action, and that Dr. Pearce was not liable since he was not Petitioners' employer. (App., infra, 23a). With respect to the hospital's liability the court said that if required it would find that the hospital was not responsible for his conduct since "Pearce was not an employee of All Saints". (App., infra, 22a). The court of appeals held that the reprimand by nurse McNeil was prompt remedial action and said it was immaterial that McNeil had no authority over Dr. Pearce. Regarding Dr. Pearce, the court said: "As a Title VII suit may not be maintained against an individual, Dr. Pearce may only be held liable if he, in his employment capacity at All Saints, is deemed to be Houston's "employer" for Title VII purposes." (App., infra, 6a). The court concluded that Dr. Pearce was not Petitioners' employer, and that he was not an "agent" of the hospital because he had not been delegated the authority to make employment decisions.

As to Petitioners claim that McNeil and the hospital violated Title VII by requiring her to push patient stretchers for the orderlies, the court of appeals held that defendant had articulated a "legitimate, nondiscriminatory reason" for the discrimination; and that Petitioner failed to raise a genuine issue as to whether defendants' proffered reason merely served as a pretext for discrimination. (App., infra, 9a).

The court of appeals held that the burden had shifted to Petitioner to show that summary judgment should not be granted, and entered judgment affirming the district court. (App., infra, 4a, 14a).

REASONS FOR GRANTING THE PETITION

The decisions below conflict with Title VII and the EEOC Guidelines designed to eliminate discrimination in the workplace and with decisions of the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 91 L. Ed 2d 49, 106 S. Ct. 2399. *Harris v. Forklift Systems, Inc.*, 510 U.S. ___, 126 L. Ed. 2d 295, 114 S. Ct. 367, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1986), *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 9 L. Ed. 2d 202, and *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, (1970).

The courts below disregarded the EEOC Guidelines and contrary to the decision in *Meritor Savings Bank v. Vinson*, declined to apply agency principles in determining whether the hospital was liable for the conduct of Dr. Pearce. The court of appeals erroneously held that Dr. Pearce was not an "agent" of the hospital and was not liable for racial and sexual discrimination.

Contrary to the holding in *Anderson v. Liberty Lobby, Inc.*, the courts below erroneously held that to defeat the motions for summary judgment Petitioner had the burden to prove that the employers explanation was not a pretext. Also, there is uncertainty as to whether the burden of proof rule announced in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed 2d 668, 93 S. Ct. 1817, should be applied in summary judgment proceedings. There is a conflict among the circuits as to the questions raised herein which have not been, but should be settled by this Court.

This case is a timely and rare opportunity to provide much needed guidance, and the issues involved are

important. Moreover, the decisions below are erroneous and such a departure from the accepted and usual course of judicial proceedings to call for an exercise of this Courts power of supervision.

I. The decisions below are in conflict with the decisions of the Supreme Court in *Meritor Savings Bank v. Vinson* and *Harris v. Forklift Systems, Inc.*.

In *Meritor Savings Bank v. Vinson*, Michelle Vinson sued her employer, Meritor Savings Bank and its vice president, Sidney Taylor claiming that she had been sexually harassed by Taylor in violation of Title VII. The district court held that the bank could not be held liable since it had no knowledge of Taylor's conduct. The court of appeals reversed and held that an employer is strictly liable for a hostile environment created by a supervisor's sexual advances even though the employer neither knew nor could reasonably have known of the misconduct. The court of appeals held that a supervisor is an "agent" of his employer for Title VII purposes, even if he lacks authority to hire, fire or promote.

The Supreme Court decided that agency principles must be considered in determining whether an employer is liable for sexual harassment by a supervisor or agent, but declined to write a definitive rule on employer liability. Justices Marshall, Brennan, Blackmon and Stevens concurring believed that the court should have applied the EEOC Guidelines to hold employers strictly liable for the acts of its agents and supervisors leading to a discriminatory work environment regardless of whether the employer had "notice" of the offense.

In the case at bar, the courts below failed to apply agency principles and held that the hospital could not be responsible for the conduct of Dr. Pearce since he was not an

employee of the hospital. Since Dr. Pearce was a non-employee both lower courts treated the case as requiring Petitioner to give notice of Dr. Pearce's misconduct before the hospital would have a duty to take remedial action. The district court concluded: "In determining whether All Saints is indeed liable for Pearce's conduct, assuming plaintiff's allegations are true, the court need not reach the point of examining the legal relationship between them". (App., infra, 22a). Thus, the district court disregarded agency principles and declined to consider the legal relationship between All Saints and Dr. Pearce. The court of appeals held that Dr. Pearce could not be liable because he was not Petitioner's employer and he was not an "agent" of the hospital since All Saints did not delegate any employment decisions to Dr. Pearce." (App., infra, 7a, 8a).

These decisions of the courts below are in direct conflict with the EEOC Guidelines which specifically declare that an employer may be liable for the sexual or racial misconduct of non-employees. See 29 C.F.R. § 1604.11(e) reading as follows: "An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees."

As previously stated, the Supreme Court in *Meritor Savings Bank v. Vinson* decided that the courts should be guided by agency principles in this area, and that the question is not whether the supervisor or agent has been delegated employment decisions such as the right to hire, fire and promote, but whether they have authority or the

appearance of authority in the workplace. Accordingly, the Court held that an examination is required of the circumstances of the relationship and job functions performed by an individual in determining whether he or she acts in a supervisory or agency capacity. (477 U.S. at p. 71). Justice Marshall in his concurring opinion explained: "In both cases it is the authority vested in their supervisor by the employer that enables him to commit the wrong; It is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates". (477 U.S. at p. 77).

The hospital placed Dr. Pearce in a position of authority which enabled him to engage in racial and sexual misconduct in the workplace and the hospital should be responsible for his unlawful harassment.

In *Harris v. Forklift Systems, Inc. Supra,* the petitioner, Harris sued her former employer claiming that the conduct of Forklift's president constituted an abusive work environment due to sexual jokes and innuendo. The Supreme Court held that in an abusive environment case, the employee is not required to prove that she was harmed psychologically; that Title VII is violated if the environment would be reasonably perceived and is perceived as hostile or abusive; and that whether an environment is hostile or abusive can be determined only by looking at all the circumstances. (126 L.Ed.2d 295, 302). In the case at bar, Petitioner's summary judgment proof showed that Dr. Pearce had authority over Petitioner in her workplace and she perceived his sexual and racial conduct to be offensive.

The district court and the court of appeals did not look at all the circumstances but only the one incident about which Petitioner complained to McNeil. The courts ignored the other circumstances and many other instances of racial and sexual conduct by Dr. Pearce during the years of Petitioner's employment at All Saints Hospital.

II. The decisions below are in conflict with the decisions of the Supreme Court in *Anderson v. Liberty Lobby, Inc.*, *Adickes v. S.H. Kress and Co.*, and *McDonnell Douglas Corp. v. Green*

In response to the hospital's motion for summary judgment, Petitioner filed a detailed response calling to the attention of the court specific facts in the deposition and affidavit of Petitioner, the deposition of Jenny McNeil, the deposition of John Milburn, the hospital's personnel director, the contract between the hospital and Dr. Pearce, and evidence showing that Dr. Pearce gave orders to hospital nurses and supervisors. Petitioner's summary judgment evidence showed that Dr. Pearce exercised authority in the workplace and that he had engaged in a pattern of sexual and racial conduct since as early as 1984, in the presence of supervisors and nurses. Petitioner called to the attention of the court in her discovery response the names of nurses, supervisors, and physicians she intended to call as witnesses to Dr. Pearce's behavior. Petitioner, in opposition to the motions for summary judgment, did not rest merely on the allegations in her pleadings. She came forward with evidence showing that Dr. Pearce was an agent of the hospital, and that he had for years engaged in racial and sexual conduct in the workplace, creating an abusive work environment.

The court of appeals, citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986), misapplied Rule 56(e), F.R.C.P. and held that Petitioner, the non-movant, had the burden to prove that there were genuine issues of material fact. The court said: "Once a movant makes a properly supported motion for summary judgment, the burden shifts to the non-movant to show that summary judgment should not be granted because a genuine issue for trial exists." (App., infra, 4a). The court in *Celotex Corp. v.*

Catrett, however, did not shift the burden. Rather, the court held that the burden on the moving party may be discharged by showing that there is an absence of evidence to support the nonmoving party's case. The court was careful to point out that the last two sentences of Rule 56(e) were added to disapprove allowing the opposing party to resist summary judgment by reference only to its pleadings. (*Celotex*, 477 U.S. at 324, 325).

In *Anderson v. Liberty Lobby, Inc. Supra*, the court made it clear that at the summary judgment stage the trial judge's function is not himself to weigh the evidence, make credibility determinations, or draw legitimate inferences from the facts, since these are jury functions. (*Anderson*, 477 U.S. at 242).

In *Adickes v. H.S. Kress and Co.*, 398 U.S. 144 (1970) the Court held that the inferences drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion and that the 1963 amendment to Rule 56(e) was not intended to modify the burden of the moving party.

Also, the court of appeals erroneously applied the burden of proof rule of *McDonnel Douglas Corp. v. Green*, 411 U.S. 792, 935, Ct. 1817, 36 L.Ed.2d 668, to a summary judgment proceeding depriving Petitioner of her right to demonstrate to a jury that the hospital's reason for disparate treatment is a pretext. The court of appeals said that Petitioner had the burden to prove that the hospital's proffered reason for disparate treatment was not true and that it merely served as a pretext for unlawful discrimination. (App., infra, 9a). The court held that in order to defeat the motion for summary judgment, Petitioner had to produce evidence at the summary judgment stage showing that McNeil harbored a discriminatory motive even though the evidence shows that the discrimination was patently obvious in purpose and effect. Such holding conflicts with all principles of jurisprudence, the Seventh Amendment, this

courts decisions in *Adickes* and *Anderson v. Liberty Lobby Inc.*, and the principle announced in *McDonnell Douglas Corp. Green*, that the employee must be afforded a fair opportunity to demonstrate the employers' assigned reason was a pretext or discriminatory in its application. (*McDonnell Douglas Corp. v. Green* 411 U.S. at 807).

Employment discrimination cases involve subjective questions of motivation and intent which can only be proven by circumstantial evidence. It is arguable that summary judgment is a questionable procedure in such cases. In any event, it is clear that Rule 56(e) F.R.C.P. does not give to trial judges the power to be the fact-finder where one of the parties demands a jury trial. In *Anderson v. Liberty Lobby Inc.*, the Supreme Court warned that trial judges should not use Rule 56(e) to denigrate the role of the jury, and made it clear that its opinion should not be construed as authorizing trial on affidavits. The Court said: "It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U.S., at 158-159. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial." (477 U.S. at p. 242).

The lower courts accepted as true McNeil's controverted and self-serving statement that Houston, as holding room nurse, was the logical person to push patients from the holding room to the operating rooms, and said that there was no reason to question McNeil's explanation. (App., infra., 21a). The evidence, however, shows that there was every reason to question McNeil, and that Houston was

the least logical person to transport patients. Houston was the only nurse assigned to the holding room. Patients had to be prepared, and their charts completed by her, before they could go to surgery. There were other nurses available as well as orderlies to push patients into surgery . The trial judge determined credibility, weighed the evidence and made the inference that it was logical to use Petitioner for pushing patients instead of the orderlies.

McNeil segregated Petitioner. She was the only nurse ordered to assume the orderlies' job of pushing stretchers. McNeil's order to Petitioner to take over the job of predominately white male orderlies was an act of overt discrimination in direct violation of Title VII. As stated by Chief Justice Burger in *Griggs v. Duke Power Co.*, 401 U.S. 424, 425: "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

The courts below did not correctly apply Title VII, and sanctioned trial by affidavit under the guise of Rule 56(e) thereby effectively denying Petitioner her Seventh Amendment right to trial by jury.

III. The court of appeals erroneously held that a mere verbal reprimand constitutes prompt remedial action.

Petitioner's summary judgment evidence showed that Dr. Pearce had been engaging in a pattern of sexual and racially offensive conduct since 1984. Petitioners evidence showed that McNeil and nurse director Petersen had been aware of Dr. Pearce's conduct for years. Petitioner did not complain until July of 1991, because McNeil knew about Dr. Pearce's conduct, and Petitioner was afraid of confronting Dr. Pearce. After Petitioner complained to McNeil in July

of 1991, McNeil met with Dr. Pearce and "counseled" him to stop making racial comments to Petitioner. Dr. Pearce, after being "counseled", stopped making racial and sexual comments directly to Petitioner. His conduct in the workplace did not change however, but continued unabated. All Saints did not investigate Petitioner's complaint, nor did it discipline Dr. Pearce or develop appropriate sanctions. The hospital took no other steps to eliminate discrimination in the workplace.

The court of appeals has held that McNeil's meeting with Dr. Pearce is a defense because it was "prompt remedial action." The court's holding is erroneous because (1) the meeting with Dr. Pearce was not prompt or immediate since he had been engaging in sexual and racial harassment for years and, (2) it was not effective because his conduct continued. The court of Appeals concluded that the reprimand was prompt because it was shortly after Houston's complaint and that it was remedial in that it stopped Dr. Pearce from making offensive comments aimed directly at Houston. (App., Infra, 5a).

Under the EEOC Guidelines an employer should take all steps necessary to prevent sexual harassment from occurring and is responsible for acts of sexual harassment in the workplace unless it can show that it took immediate and appropriate corrective action. 29 C.F.R.§ 1604.11(b)

In *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981) the court held that an employer should promptly take all necessary steps to investigate and correct any harassment, including warnings and appropriate discipline directed at the offending party, and should generally develop other means of preventing harassment within the agency.

The courts below did not consider the totality of the circumstances pertaining to Dr. Pearce's sexual and racial conduct, but focused on the one incident which was reported to McNeil in July of 1991. The Supreme Court in *Meritor*

Savings Bank v. Vinson held: "The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of 'the record as a whole' and 'the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidence occurred.' 29 C.F.R. § 1604.11(b) (1985)." (477 U.S. at 69).

The court of appeals decision conflicts with the EEOC Guidelines, *Meritor Savings Bank v. Vinson*, and the D.C. circuits' decision in *Bundy v. Jackson.*

IV. There is a conflict among the circuits as to whether agents and supervisory employees are liable for violating Title VII.

Title VII defines "employer" to include "any agent of such a person." 42 U.S.C. § 2000e(b).

In *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir., 1986) the fifth circuit held that the definition of "employer" is broad and includes agents of the actual employer; and that employees' immediate supervisors are liable as "agents" under Title VII. In *Miller v. Maxwell's Intern. Inc.*, 991 F.2d 583 (9th Cir. 1993) the ninth circuit held that Title VII liability was limited to employers and did not extend to individual agents of employers who committed violations.

In *Rogers v. EEOC*, 454 Fed 234, 238 (5th Cir, 1971) cert. denied, 406 U.S. 957), cited by the Supreme Court in *Meritor*, Justice Goldberg said: "We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination." If the definition of "employer" is given a liberal interpretation then supervisors and others exercising

authority in the workplace are "agents" under the Court's decision in *Meritor*.

The Supreme Court should resolve the conflict and decide that immediate supervisors and others who exercise authority in the workplace are "agents" and are liable when they violate Title VII. To hold otherwise will encourage supervisory personnel and others with authority such as Dr. Pearce to believe that they may violate Title VII with impunity.

V. The Question Presented is Important.

Notwithstanding the warning in *Anderson v. Liberty Lobby Inc.* the district courts are using Rule 56(e) F.R.C.P. as authority for a "trial on affidavits" and are deciding jury issues by summary judgment. The court of appeals in this case used *Anderson v. Liberty Lobby Inc.* as authority for the proposition that the non-movant must set forth specific facts supported by "summary judgment evidence" "establishing" the existence of a genuine issue as to any material fact, and cited *Celotex Corp. v. Catrett* for the proposition that the burden shifts to the nonmovant to show that summary judgment should not be granted (App., infra, 4a).

As predicted by Justice Brennan in his dissent in *Anderson v. Liberty Lobby Inc.*, trial judges have a "new procedure", and there is danger of a proliferation of summary judgment cases after "paper trials" on the merits.

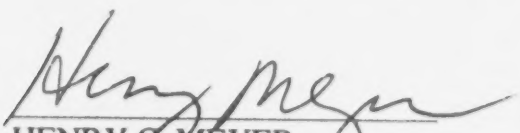
The courts below decided that Petitioner's quantum of "summary judgment proof" was not sufficient to permit a jury to weigh the evidence, determine the credibility of the witnesses, and decide what were logical and legitimate inferences from the facts. This case presents a rare opportunity for this Court to address the serious questions raised by the decisions of the courts below.

In addition, this case presents an opportunity for the Court to issue a definitive rule on "agency" and employer liability in Title VII cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,



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APPENDIX

APPENDIX A

Opinion of court of appeals 1a

Order denying rehearing 15a

U.S. COURT OF APPEALS
FILED APR. 21, 1995
CHARLES R. FULBRUGE III, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-10968
Summary Calendar

PAMELA SUE HOUSTON,

Plaintiff-Appellant,

Versus

EBI COMPANIES, ET AL.,

Defendants,

DR. KENNETH PEARCE, JENNY McNEIL, individually, JENNY McNEIL, etc., All Saints Episcopal Hospital,

Defendants-Appellees

Appeal from the United States District Court
For the Northern District of Texas
(4:93-CV678-A)

Before DUHE, WIENER , STEWART, Circuit Judges.
PER CURIAM:*

Plaintiff-Appellant Pamela Sue Houston filed suit in state court against All Saints Episcopal Hospital (All Saints), Jenny McNeil (McNeil), and Dr. Kenneth Pearce (Dr.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Pearce) (collectively, the Defendants-Appellees), alleging various common law torts as well as violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq.; 42 U.S.C. § 1981; the Texas Workers' Compensation Act; and the Texas Constitution. The Defendants-Appellees removed the case to the federal district court, which granted summary judgment in favor of the Defendants- Appellees and dismissed Houston's claim. Concluding in our plenary review that Houston has failed to show the existence of a genuine issue as to any material fact, we affirm the district court's dismissal.

I
FACTS AND PROCEEDINGS

Houston, an African-American registered nurse, was hired by All Saints in 1984. At that time, Dr. Pearce, a male Caucasian anesthesiologist, was performing anesthesia services at All Saints under a contract between the hospital and Anesthesia Care, Inc.[1] Houston worked with Dr. Pearce on occasion in her position as a nurse in the surgery department's Holding Room, where patients were taken prior to their surgeries.

McNeil was the supervisor of nurses in All Saints' surgery department. She completed Houston's evaluation forms based largely on information received from Ellen Baldwin, Houston's direct supervisor.

In July 1991, Houston complained to McNeil that Dr. Pearce had made a racially offensive comment to her. McNeil immediately reported Houston's complaint to the Director of Surgical Services at that time, Geraldine Petersen, who approved McNeil's proposed course of action- - to advise Dr. Pearce that racially offensive language would

[1]Dr. Pearce served as president of Anesthesia Care, Inc.

not be tolerated and that he must not make such remarks in the future. As soon as McNeil reprimanded Dr. Pearce, his conduct improved; he made no further racist comments to Houston.

In mid-August 1991, Houston injured her back while pushing a patient stretcher. She filed a worker's compensation claim and never returned to work at All Saints. On October 15, 1991, Houston filed a charge of employment discrimination against All Saints with the Equal Employment Opportunities Commission (EEOC) and the Fort Worth Human Relations Commission, the EEOC's local investigative agency, which responded by issuing Houston a "Notice of Right to Sue."

By letter dated June 18, 1992, All Saints advised Houston that her employment would be terminated under All Saints' leave of absence policy if she did not return to work by June 1, 1993, the anniversary of the June 1, 1992 date on which she had reached "maximum medical improvement" (MMI) according to the Texas Workers' Compensation Commission (TWCC). When June 1, 1993 came without Houston having reported to work, All Saints removed her from its active employment roster and sent her a letter informing her of its actions.

Houston's state court suit was filed against All Saints, McNeil, and Dr. Pearce on August 20, 1993, alleging various federal and state claims.[2] As noted earlier, the Defendants-Appellees removed the case to district court where they moved for summary judgment. The district court granted their motion and dismissed Houston's action. On appeal, Houston challenges the district court's summary judgment dismissal of her hostile work environment, discrimination, and retaliatory discharge claims.

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[2] Houston also sued EBI Companies, which was later dismissed from the suit by agreement of the parties.

II
ANALYSIS

A. STANDARD OF REVIEW

In reviewing a grant of summary judgment, we apply the same standard as the district court.[3] Summary judgment must be granted if the record taken as a whole shows that there is no genuine issue as to any material fact that could lead a rational jury to find for the nonmoving party.[4] Our review of the facts in the record, however, draws all inferences most favorable to the party opposing the motion.[5] Once a movant makes a properly supported motion for summary judgment, the burden shifts to the nonmovant to show that summary judgment should not be granted because a genuine issue for trial exists.[6] The party opposing the summary judgment motion may not rest on mere allegations in the pleadings, but must set forth specific facts supported by summary judgment evidence establishing the existence of a genuine issue as to any material fact.[7]

B. HOSTILE WORK ENVIRONMENT

1. Prompt Remedial Action

To establish a claim against an employer grounded in the existence of a hostile work environment, a plaintiff must show, inter alia, that the employer knew or should have

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[3] Waltman v. Int'l Paper Co., 875 F.2d 468, 474 (5th Cir. 1989).

[4] See Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc).

[5] Reid v. State Farm Mut. Auto. Ins. Co., 784 F.2d 577, 578 (5th Cir. 1986).

[6] See Celotex Corp. v. Catrett, 106 S.Ct. 2548, 2552-53 (1986).

[7] See Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2514 (1986); Topalian v. Ehrman, 954 F.2d 1125, 1131 (5th Cir. 1992), cert. denied, 113 S.Ct. 82 (1992).

known of the harassment in question and failed to take prompt remedial action "reasonably calculated" to end the harassment.[8] We have previously observed that the effectiveness of any initial remedial steps taken by the employer is an important factor in assessing what constitutes appropriate remedial action.[9] After reviewing the summary judgment evidence, we conclude that All Saints took prompt remedial action in dealing with Houston's complaint about Dr. Pearce.

After Houston informed McNeil of Dr. Pearce's offensive behavior, McNeil assured Houston that she would address the matter and immediately reported the complaint to Petersen, the Director of Surgical Services, who told McNeil that her planned reprimand of Dr. Pearce was the appropriate course of action. McNeil wasted no time in meeting with Dr. Pearce, telling him that racially offensive language would not be tolerated, and counseling him to cease making racist comments to Houston. After the meeting, Houston was promptly informed by McNeil of just how she had dealt with Houston's complaint. Houston admitted in her deposition that after McNeil's meeting with Dr. Pearce, his behavior "toned down a lot" and that Dr. Pearce made no further racially offensive comments to her.

Houston argues nonetheless that McNeil's reprimand could not possibly qualify as prompt remedial action because McNeil was only a nurse supervisor who had no authority over Dr. Pearce. We disagree, particularly in light of the effectiveness of McNeil's reprimand. McNeil's talk with Dr. Pearce, which occurred shortly after McNeil received

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[8] See Garcia v. Elf Atochem North America, 28 F.3d 446, 451 (5th Cir. 1994); Jones v. Flagship Int'l, 793 F.2d 714, 720 (5th Cir. 1986), cert. denied, 107 S.Ct. 952 (1987).

[9] See Waltman v. Int'l Paper Co., 875 F.2d 468, 479 (5th Cir. 1989). See also Garcia, 28 F.3d at 451 (upholding grant of summary judgment for defendant, as he took prompt action against harasser and harassment actually ended).

Houston's complaint, succeeded in putting an immediate and permanent stop to Dr. Pearce's offensive comments aimed at Houston.[10] McNeil's technical authority in relation to Dr. Pearce is, therefore, irrelevant; the district court was correct in granting summary judgment on this ground.[11]

2. Dr. Pearce's Liability

Houston Also attempts to hold Dr. Pearce liable for his alleged discriminatory behavior towards Houston. As a Title VII suit may not be maintained against an individual, Dr. Pearce may only be held liable if he, in his employment capacity at All Saints, is deemed to be Houston's "employer" for Title VII purposes.[12] Title VII defines an "employer" as a person who has a certain number of employees and any agent of such person.[13]

We have previously held that the determination whether a defendant is a Title VII employer is a two-step process: first, the defendant must meet the statutory definition and second, an employment relationship must

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[10] Although McNeil testified that Houston complained to McNeil only about Dr. Pearce's racist comments, we find in our analysis of Houston's hostile work environment claim that, as the alleged remarks contained both racial and sexual overtones, All Saints' prompt remedial action effectively put an end to both forms of harassment.

[11] As we agree with the district court's finding that All Saints took prompt remedial action in response to Houston's complaint, we need not, and therefore do not, address the preliminary issue whether All Saints is even subject to liability for Dr. Pearce's actions through any employer-employee or principal-agent relationship.

[12] See Grant v. Lone Star Co., 21 F.3d 649, 652 (5th Cir. 1994), cert. denied, 115 S.Ct. 574 (1994).

[13] Title VII states that "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar week in the current or preceding calendar year, and any agent of such a person." 42 U.S.C.
§ 200e(b)

exist between the defendant and the plaintiff.[14] The first step here is a given, as the parties agree that Dr. Pearce meets the Title VII statutory definition of employer by virtue of employing fifteen or more Certified Registered Nurse Anesthetists to assist him at the hospital. As to the second step, however, we conclude that the summary judgment evidence fails to show that an employment relationship existed between Houston and Dr. Pearce, thereby defeating Houston's efforts to have Dr. Pearce classified as her employer for Title VII purposes.

In determining whether an employment relationship exists, we apply the "hybrid economic realities/common law control test."[15] For the economic realities component of the test, we have focused on whether the putative employer paid the individual's salary, withheld taxes, provided benefits and set the terms and conditions of employment.[16] In examining the control component of the test, we have considered whether the putative employer has the right to hire and fire, to supervise the individual's work, and to set the individual's work schedule.[17] The right to control and direct a putative employee's work is the most important aspect of the control component.[18]

Houston claims that her testimony to the effect that Dr. Pearce "took charge" of the surgery department, that the nurses obeyed his orders, and that she believed that Dr. Pearce could have her fired, is sufficient to present a genuine issue as to a material fact. We disagree with Houston's

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[14] See Deal v. State Farm Co. Mut. Ins. Co. of Texas, 5 F.3d 117, 118 n.2 (5th Cir. 1993) (citing Fields v. Hallsville Indep. Sch. Dist., 906 F.2d 1017, 1019 (5th Cir. 1990)).

[15] See id. at 118-19.

[16] See id. at 119; Mares v. Marsh, 77 F.2d 1066, 1068 (5th Cir. 1985).

[17] See Deal, 5 F.3d at 119; Fields v. Hallsville Indep. Sch. Dist., 906 F.2d at 1019-20 (5th Cir. 1990), cert. denied, 111 S.Ct. 676 (1991).

[18] See Fields, 906 F.2d 1017, 1019.

assertion. There is a total absence of any evidence in the record that Dr. Pearce had any input regarding Houston's employment conditions. The parties stipulated that Houston's direct supervisor was Ellen Baldwin, who reported to McNeil, and that Dr. Pearce did not set Houston's schedule, did not evaluate Houston's job performance, and did not have the authority to discharge any All Saints employee. The summary judgment evidence also reveals that Dr. Pearce did not provide Houston with any benefits or compensation.

Houston alternatively contends that, even if she had no employment relationship with Dr. Pearce, he functioned as an agent of her employer, All Saints, thereby subjecting him to Title VII liability. In refuting Houston's assertion that Dr. Pearce served as All Saints' agent, the Defendants-Appellees convincingly rely on our decision in Deal v. State Farm Co. Mut. Ins. Co. of Texas.[19] In Deal, we held that an "agent," for Title VII purposes, must be an agent with respect to employment practices.[20] The record in the instant case does not indicate that All Saints delegated any employment decisions to Dr. Pearce. The only evidence that Houston presents in her favor is her self-serving, subjective testimony that she believed that Dr. Pearce could have her fired and that Dr. Pearce must have had some relationship with All Saints, as he was performing services at the hospital. Houston's mere speculation is insufficient to create a genuine issue for trial. The summary judgment evidence does not reflect the existence of a genuine issue of material fact as to whether Dr. Pearce was Houston's "employer" for Title VII purposes -- either through a common-law employment relationship with Houston or as All Saints'

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[19] 5 F.3d 117 (5th Cir. 1993).

[20] See id. at 119 (citing York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982)).

agent -- so the district court was correct in granting summary judgment in Dr. Pearce's favor.[21]

C. DISCRIMINATION

Houston alleged that All Saints and McNeil discriminated against her by requiring her to push patient stretchers, which allegedly caused her to fall behind in completing patient charts before the patients went in to surgery and adversely affected her job performance evaluations. She asserted that pushing stretchers was not part of her job duties and that McNeil had targeted her to do the task because Houston was an African-American nurse. We conclude that the summary judgment evidence does not reveal that discrimination had anything to do with McNeil's actions in requesting Houston to push patient stretchers.

Once a plaintiff shows a prima facie case of discrimination, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the allegedly discriminatory action.[22] If the defendant meets this burden of production, the plaintiff must then prove by a preponderance of the evidence that the defendant's proffered reason was not true and that it merely served as a pretext for unlawful discrimination.[23] The plaintiff retains at all times

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[21] The Defendants-Appellees argue that Houston failed to exhaust her EEOC remedy by not mentioning Dr. Pearce in the EEOC charge and that she also failed to meet the Title VII jurisdictional prerequisites for her sex discrimination and harassment claims because her EEOC charge alleged only race, and not sex, discrimination. As we have found no genuine issue of material fact supporting the merits of Houston's claims, however, we need not, and do not, address these procedural issues.

[22] McDonnell Douglas Corp. v. Green, 93 S.Ct. 1817, 1824 (1973).

[23] See St. Mary's Honor Center v. Hicks, 113 S.Ct. 2742, 2747 (1993); Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993).

the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff.[24] If the plaintiff does not present sufficient evidence for a jury to find that the protected status motivated the defendant's actions, or if the evidence that plaintiff offers is merely colorable or is not significantly probative, summary judgment for the defendant is appropriate.[25]

Houston did not produce any evidence showing that McNeil's motivation for ordering Houston to push the stretchers was discriminatory. On the contrary, the summary judgment evidence reveals that more efficient handling of patients was the reason McNeil asked Houston to help push stretchers. Defendant McNeil stated in her affidavit that orderlies at the hospital usually pushed patients on stretchers into the operating room, but first had to don head and shoe covers to preserve the sterile environment, thereby delaying the surgeries. As the surgical nurses were already prepared to enter the operating room, their assistance in pushing the stretchers sped up the process of moving patients, thereby expediting the surgical process.

Houston admitted in her deposition that the hospital wanted to move patients into the operating room faster, corroborating McNeil's statements. She also conceded that, from the outset of her employment with All Saints, she was always required to assist in pushing stretchers. McNeil testified that as a surgical nurse, Houston was a logical person from whom to seek assistance in pushing stretchers. Houston does not refute this testimony; neither does she present any evidence of discrimination, either direct or circumstantial. Thus, we uphold the district court's conclusion that Houston has failed to show that McNeil

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[24] See Texas Dep't of Community Affairs v. Burdine, 101 S.Ct. 1089, 1093 (1981).

[25] See Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2511 (1986).

harbored a discriminatory motive in requesting that she push stretchers.

D. RETALIATORY DISCHARGE

Houston also contends that All Saints terminated her employment in retaliation for her filing an EEOC charge of discrimination and a workers' compensation claim with the TWCC. A plaintiff alleging retaliatory discharge bears the initial burden of showing a prima facie case of the employer's retaliatory conduct, after which the burden shifts to the employer to articulate some legitimate nondiscriminatory reason for discharging the employee.[26] As noted previously in our discussion of Houston's discrimination claim, once the employer meets this burden, the plaintiff has the burden of demonstrating that the employer's reason was merely a pretext for discrimination.[27]

Houston does not present any evidence of a causal nexus between her filings and her termination, an indispensable element of a prima facie case of retaliatory discharge.[28] She merely states that All Saints must have known that she filed a workers' compensation claim and an EEOC charge, and that, therefore, her filings must have been the reason she was terminated. This is obviously an unavailing leap of logic: An employer's knowledge of a plaintiff's participation in a protected activity, without more, is insufficient to show a causal connection between the

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[26] See McDonnell, 93 S.Ct. at 1824; Burdine, 101 S. Ct. at 1094-95 (1981); Anderson v. Douglas & Lomason Co., 26 F.3d 1277, 1300 (5th Cir. 1994), cert. denied, 115 S.Ct. 1099 (1995).

[27] See McDonnell, 93 S.Ct. at 1825.

[28] See Anderson, 26 F.3d at 1300; Parham v. Carrier Corp., 9 F.3d 383, 389 (5th Cir. 1993); Swearingen v. Owens-Corning Fiberglas Corp., 968 F.2d 559, 562-63 (5th Cir. 1992); Jones v. Roadway Express, Inc., 931 F.2d 1086, 1090 (5th Cir. 1991).

plaintiff's participation in the activity and the adverse employment action.[29]

In addition, a review of the summary judgment evidence indicates that Houston's employment was terminated for no other reason than a neutral and consistent application of All Saints' absence control policy, which mandates an employee's discharge after a one-year leave of absence. Houston does not allege that All Saints applied the absence policy in a disparate manner. In fact, All Saints submitted evidence that all employees who were placed on leave in 1992 and did not return to work were terminated in 1993 under the absence control policy, regardless of the reasons for their absences. And, Houston's conclusionary allegations to the contrary notwithstanding, no evidence in the record shows that All Saints harbored any hostility towards Houston as a result of her having filed a workers' compensation claim and an EEOC charge. Contrary to Houston's contention, All Saints' facially neutral letter to Houston advising her that she had been placed on "non-active status" does not in itself imply any retaliation, as the evidence reveals that it was sent pursuant to the hospital's standard, automatic procedure for discharging employees who were absent for more than a year.

In a feckless effort to support her argument, Houston stresses that, contrary to All Saints' statement in its pre-termination letter to Houston, the TWCC did not rule that

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[29] See Parham, 9 F.3d at 387 (rejecting plaintiff's assertion that employer's knowledge that employee had filed workers' compensation claim, standing on its own, was sufficient evidence of retaliatory motive); see e.g., Paragon Hotel Corp. v. Ramirez, 783 S.W.2d 654, 658-60 (Tex.App.-E. Paso 1989) (in reviewing sufficiency of evidence for retaliatory discharge verdict, court looked not only to employer's knowledge of compensation claim, but employer's expression of negative attitude toward worker's injury, failure to adhere to company policies, and disparate treatment of other employees who were similarly situated but not discharged).

she had reached MMI on June 1, 1992. All Saints used the MMI date as the starting point for Houston's one-year leave of absence and stated in its deposition that Houston was terminated because she failed to report for work by June 1, 1993. But even if All Saints' adoption of the June 1, 1992 MMI date for calculating Houston's leave of absence was in error, that mistake is irrelevant to a determination whether a prima facie case of discrimination exists.[30] Indeed, we have previously held that an employer's incorrect but sincere and reasonable belief that it had a valid reason to discharge an employee negates a finding that the termination was due to the employee's participation in a protected activity, i.e., filing a workers' compensation claim or an EEOC charge.[31] As Houston has failed to produce any summary judgment evidence of a causal connection between her filings and her discharge, no genuine issue as to any material fact exists for her retaliatory discharge claim.

Houston also asserts on appeal that the district court should have remanded her retaliatory discharge claim to the state court, as one of the grounds of that claim is based on Texas workers' compensation laws.[32] Under 28 U.S.C. §

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[30] See Jeffries v. Harris Co. Community Action Ass'n, 615 F.2d 1025, 1036 (5th Cir. 1980) (employer's sincere belief in confidentiality of documents that employee copied and disseminated justified employee's termination, and correctness of employer's belief was irrelevant to discrimination question).

[31] See Dickerson v. Metropolitan Dade Co., 659 F.2d 574, 581 (5th Cir. Unit B Oct. 19, 1981) (observing that even if employer was wrong in its evaluation of employee's absenteeism, it did not violate Title VII if it acted on reasonable belief); Corley v. Jackson Police Dep't, 639 F.2d 1296, 1298 (5th Cir. Unit A Mar. 19, 1981) recognizing that mistaken but good-faith belief that employee violated employer's rules is sufficient to rebut McDonnell Douglas inference that employee's discharge was for impermissible reasons).

[32] See Jones v. Roadway Express, Inc., 931 F.2d 1086, 1091-92 (5th Cir. 1991) (holding that a claim based on Tex. Rev. Civ. Stat. Ann. art. 8307c, prohibiting retaliatory discharge, arises under workers' compensation laws of Texas).

1445(c), a defendant may not remove a civil action arising under a state's workers' compensation laws.[33] If the Defendants-Appellees' removal of Houston's retaliatory discharge claim was thus defective, the defect was procedural, requiring Houston to move for remand within thirty days.[34] As Houston never objected to the removal, she waived any procedural defect in the removal process and therefore forfeited any right to a remand.

III
CONCLUSION

As we find that Houston has failed to show the existence of any genuine issue of material fact for her claims alleging unlawful employment practices, the district court's grant of summary judgment is
AFFIRMED.

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[33] Section 1445(c) states, "A civil action in any state court arising under the workmen's compensation laws of such State may not be removed to any district court of the united States."

[34] See Williams v. AC Spark Plugs Div. of General Motors Corp., 985 F.2d 783, 787-88 (5th Cir. 1993).

U.S. COURT OF APPEALS
FILED JUN. 12, 1995
CHARLES R. FULBRUGE III, CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 94-10968

PAMELA SUE HOUSTON,

Plaintiff-Appellant,

Versus

EBI COMPANIES, ET AL.,

Defendants,

DR. KENNETH PEARCE, JENNY McNEIL,
individually, JENNY McNEIL, etc.,
ALL SAINTS HEALTH CARE, INC., d/b/a
All Saints Episcopal Hospital,

Defendants-Appellees

Appeal from the United States District Court
For the Northern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion 4/21/95, 5Cir., 1995, F.3d) (June 12, 1995)
Before DUHE, WIENER , STEWART, Circuit Judges.
PER CURIAM:
(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.
ENTERED FOR THE COURT:
"S/ J Wiener J "
United States Circuit Judge

APPENDIX B

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U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
OCT. -7- 1994
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PAMELA SUE HOUSTON,	§	
Plaintiff,	§	
VS.	§	NO. 4;93-CV-678-A
ALL SAINTS HEALTH	§	
CARE, INC., D/B/A	§	
ALL SAINTS EPISCOPAL	§	
HOSPITAL, ET AL,	§	
Defendants.	§	

MEMORANDUM OPINION
and
ORDER

Came on for consideration the motions of defendants All Saints Health System (named as "All Saints Health Care, Inc., d/b/a All Saints Episcopal Hospital " in plaintiff's complaint) ("all Saints"), Jenny McNeil (McNeil"), and Kenneth Pearce, M.D. ("Pearce") for summary judgment.[1] The court, having considered the motions, the responses of plaintiff, Pamela Sue Houston, the summary judgment

[1] As explained infra, the motions have already been partially granted.

evidence, the record,[2] and applicable authorities, finds that the motions should be granted.

I.

Plaintiff's Claims

On or about August 20, 1993, plaintiff filed her original petition in the 141st District Court of Tarrant County, Texas. On September 23, 1993, plaintiff filed her first amended original petition. By notice of removal filed o October 8, 1993, the action was removed to this court. Plaintiff was subsequently granted leave to amend her pleading once again, and, on April 19, 1994, filed her second amended complaint.

In her second amended complaint, plaintiff alleges that defendants discriminated against her based on her race and sex in violation of Title VII and 42 U.S.C. § 1981; that they were negligent per se in failing to ensure that applicable standards, ordinances, regulations and statutes were followed; that defendant All Saints hired incompetent workers and failed to properly supervise them and is thus vicariously responsible for harm caused by such persons to plaintiff; that defendants are liable for intentional infliction of emotional distress; and that defendant All Saints is liable for retaliatory discharge under the Texas Workers' Compensation Act. In connection with her Title VII claim, plaintiff specifically alleges that defendants (1) constructively discharged her by maintaining or allowing a hostile work environment, (ii) retaliated for her opposition to sexual harassment in the workplace, (iii) engaged in

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[2] The record includes admissions of the parties contained in the "Established Facts" sections of the joint pretrail order signed September 28, 1994, and the supplemental joint pretrial order signed October 7, 1994. See Fed. R. Civ. P. 56(c).

disparate treatment because of plaintiff's race, and (iv) treated employees in such a way as to have a negative disparate impact on black professional employees.

In a telephone conference hearing on September 28, 1994, plaintiff, through her counsel, confirmed that she was abandoning a number of the claims asserted in her second amended complaint and that the only claims she still asserts are those set forth in the "Statement of Plaintiff's Claims" section of the joint pretrial order signed by the court on September 28, 1994.[3] Accordingly, the court, by order signed September 29, 1994, granted the motions for summary judgment to the extent that plaintiff had abandoned certain of her claims. The claims that plaintiff now asserts are that (1) she was discharged in retaliation for filing a workers' compensation claim and for filing an EEOC charge; (2) defendants All Saints and McNeil discriminated against plaintiff based on her race in connection with her merit raise, work breaks, twenty-four hour drug audit, pushing stretchers, completion of charts, and funeral leave; and (3) defendant Pearce subjected plaintiff to racial and sexual harassment constituting a hostile work environment.

II.

Applicable Summary Judgment Principles

A party is entitled to summary judgment on all or any part of a claim as to which there is no genuine issue of material fact and as to which the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). The moving party has the initial burden of showing that there is no genuine issue of material fact. Anderson, 477 U.S. at 256. The movant may discharge this burden by showing an

[3] The joint pretrial order is also signed by counsel for all Parties.

absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has carried its burden under Rule 56(c), the non-moving party must do more than merely show that there is some metaphysical doubt as to the material facts. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The party opposing the motion may not rest on mere allegations or denials of pleading, but must set forth specific facts showing a genuine issue for trial. Anderson, 477 U.S. at 248, 256. An issue is material only if its resolution could affect the outcome of the action. Id. at 248. Unsupported allegations, conclusory in nature, are insufficient to defeat a proper motion for summary judgment. Simmons v. Lyons, 746 F.2d 265, 269 (5th Cir. 1984).

The Fifth Circuit explained the burden placed n the nonmovant:

> When the nonmovant fails to make a sufficient showing on an essential element of her case, the moving party is entitled to summary judgment "since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."

McKee v. City of Rockwall, Texas, 877 F.2d 409, 414-15 (5th Cir. 1989) (quoting Celotex Corp., 477 U.S. at 323), cert. denied, 493 U.S. 1023 (1990).

III.

Standards applied to the Facts

A. Retaliation Claims:

Plaintiff first complains that she was terminated in retaliation for filing a workers' compensation claim. The burden is on plaintiff to establish a causal nexus between her compensation claim and discharge. Parham v. Carrier Corp., 9 F.3d 383, 386 (5th Cir. 1993). Moreover, to escape summary judgment, plaintiff must demonstrate the existence of evidence on each element essential to her case. Swearingen v. Owens-Corning Fiberglas Corp., 968 F.2d 559, 563 (5th Cir. 1992).

Here, defendants maintain that plaintiff was discharged as a result of the neutral application of an absence control policy. Swearingen, 968 F.2d 559. The summary judgment evidence reflects that plaintiff was terminated when she exhausted her one-year leave of absence without reapplying for employment. Plaintiff has not come forward with any summary judgment evidence to raise a genuine fact issue as to the reason for her termination.[4]

Plaintiff additionally alleges that she was discharged in retaliation for filing an EEOC charge of discrimination. Plaintiff has not, however, presented any evidence that she has exhausted her administrative remedies with regard to such a claim. Ray v. Freeman, 626 F.2d 439, 442-43 (5th Cir. 1980), cert. denied, 450 U.S. 997 (1981) ; Aleman v. Texas, 803 F. Supp. 10, 13 (S.D. Tex. 1992). Nor is there

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[4] Although a retaliation claim is not removable and would ordinarily be remanded upon disposition of all other removable claims, Jones v. Roadway Express, Inc., 936 F.2d 789, 792 (5th Cir. 1991), justice would not be served by such a remand in this case. The summary judgment evidence clearly reflects that plaintiff was given notice of her placement on nonactive status and warned that if she did not return to work by June 1, 1993, she would be discharged. Plaintiff was in fact discharged upon expiration of the one-year nonactive status. There is no evidence of any causal connection between plaintiff's compensation claim and her termination, much less any evidence that plaintiff was treated any differently than any other similarly situated employee.

any summary judgment evidence to suggest that plaintiff was fired in retaliation for filing any charge of discrimination.

B. Discrimination Claims Against Defendants All Saints and McNeil:

Plaintiff maintains that defendant All Saints and McNeil[5] discriminated against her based on her race in connection with her merit raise, work breaks, twenty-four hour drug audit, pushing stretchers, completion of charts, and funeral leave. In this regard, however, she does not adduce any summary judgment evidence to support her conclusory allegations that she was discriminated against. For example, in her affidavit in opposition to the summary judgment motions, plaintiff admits that she was asked to push stretchers to get patients to the operating rooms faster. Specifically, "[plaintiff] overheard Dr. Pearce say numerous times that he wanted everything speeded up and that he couldn't make any money with patients in the holding room." Plaintiff'[s Reply to Defendant All Saints' Motion for Partial Summary Judgment, Exhibit "A", Affidavit of Pamela Sue Houston at 5. In her deposition, plaintiff stated that she did not know why she was asked to perform the task of pushing stretchers. McNeil testified that plaintiff was asked to push the stretchers because she was the holding room nurse and the logical person to do the job. There is no reason to question McNeil's explanation, i.e. no summary judgment evidence to raise a genuine fact issue regarding McNeil's explanation.

Plaintiff's deposition testimony with regard to each of the alleged acts of discrimination by All Saints and McNeil is similar. In each instance, plaintiff admits that she does not know whether she was treated differently from

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[5] The Title VII claims are asserted against McNeil in her capacity as surgical supervisor only. See September 21, 1994, order regarding dismissal of Title VII claims against McNeil in her individual capacity.

other employees on the basis of her race.[6] The summary judgment evidence is insufficient to raise a fact issue as to any of the alleged bases for discrimination claims by plaintiff.

C. Discrimination Claims Based on Alleged Racial and Sexual Harassment by Defendant Pearce:

Plaintiff maintains that she was subjected to racial and sexual harassment by defendant Pearce that was so pervasive as to create hostile working environment. She further alleges that, because of Pearce's relationship with defendant All Saints, All Saints is liable for Pearce's conduct.

In determining whether All Saints is indeed liable for Pearce's conduct, assuming plaintiff's allegations are true, the court need not reach the point of examining the legal relationship between them.[7] That step is not necessary, because the summary judgment evidence shows that, whether or not Pearce was its employee, immediately after

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[6] These admissions are also included in the "Established Facts" sections of the pretrial orders at 6, ¶ ¶ 28, 32. In at least one instance, plaintiff admits that she believes she was treated differently because of ¶comments she made that were critical of hospital practices and procedures with regard to the twenty-four hour drug audit. Id. at 12, ¶ 72.

[7] If such an examination was required, the court would find that there is insufficient summary judgment evidence adduced by plaintiff to create a fact issue as to an employer /employee relationship between All Saints and Pearce. The summary judgment evidence reflects instead that Pearce was an employee of Anesthesia Care, Inc., which in turn had a contract with All Saints. Applying the "hybrid economic realities/common law control test" of the Fifth Circuit, the summary judgment evidence leads only to the conclusion that Pearce was not an employee of All Saints. See Deal v. State Farm County Mutual Ins. Co., 5 F.3d 117, 119 (5th Cir. 1993); 10/7/94 Supplemental Joint pretrial order, ¶ 139.

plaintiff complained of Pearce's conduct, All Saints reprimanded Pearce. Plaintiff did not thereafter make any complaint regarding Pearce's conduct and, in fact, admitted that his conduct toward her changed. An employer does not have to use the most serious sanction available to punish an offender. Rather, as here, the employer need only take steps reasonably calculated to stop the harassment. Nash v. Systems, Inc., 9 F.3d 401, 404 (5th Cir. 1993); Landgraf v. USI Film Prods., 968 F.2d 427, 430 (5th Cir. 1992), aff'd, 114 S. Ct. 1483 (1994).

As for the claims against defendant Pearce, plaintiff has not come forward with sufficient summary judgment evidence to create a fact issue as to an employer/employee relationship between them. Rather, plaintiff has stipulated, in the September 28, 1994, joint pretrial order, that she was employed by defendant All Saints and that she did not have an employment contract with Dr. Pearce or Anesthesia Care, Inc.[8] 9/28/94 Joint pretrial order, § (F), ¶ ¶1& 3. Title VII applies only to employers, employment agencies, and labor organizations. Moreover, there is no summary judgment evidence that plaintiff filed any EEOC charge, much less a timely charge, against defendant Pearce. Way v. Mueller Brass Co., 840 F.2d 303, 307 (5th Cir. 1988). Nor is there any evidence that PEARCE waived, or is estopped from asserting, the requirement of a timely EEOC claim. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982). To the extent plaintiff purports to assert a discrimination claim under 42 U.S.C. § 1981, such claim cannot be maintained. Patterson v. McLean Credit Union, 491 U.S. 164, 176-86 (1989). The conduct complained of by plaintiff occurred prior to enactment of the Civil Rights Act of 1991, which

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[8] Plaintiff has further stipulated to facts that are inconsistent with an alleged employer/employee relationship with Pearce in the 10/7/94 Supplemental Joint pretrial order, ¶ ¶ 85, 86, 89-93, 108-116, 118, 120, 122.

extended the protections of § 1981 to conduct occurring after establishment of the employment relationship. Said Act does not apply retroactively. Landgraf v. USI Film Prods., 128 L.Ed 229, 265 (1994).

IV.

For the reasons discussed herein,

The court ORDERS that defendants' motions for summary judgment be, and are hereby, granted and that plaintiff take nothing on her claims against defendants.

SIGNED October 7, 1994.

"S/ J McBryde "
JOHN McBRYDE
United States District Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED OCT. 7 1994
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PAMELA SUE HOUSTON,	§	
Plaintiff,	§	
VS.	§	NO. 4;93-CV-678-A
ALL SAINTS HEALTH	§	
CARE, INC., D/B/A	§	
ALL SAINTS EPISCOPAL	§	
HOSPITAL, ET AL,	§	
Defendants.	§	

FINAL JUDGMENT

In accordance with the court's memorandum opinion and order of even date herewith,

The court ORDERS, ADJUDGES and DECREES that plaintiff, Pamela Sue Houston, take nothing on her remaining claims against defendants, All Saints Health System (named as "All Saints Health Care, Inc., d/b/a All Saints Episcopal Hospital" in Plaintiff's complaints), Jenny McNeil, and Kenneth Pearce, M.D., and that such claims be, and are hereby, dismissed. The court further ORDERS, ADJUDGES and DECREES that defendants have and recover their court costs from plaintiff.

SIGNED October 7, 1994.

"S/ J McBryde "
JOHN McBRYDE
United States District Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED SEPT. 21 1994
NANCY DOHERTY, CLERK

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PAMELA SUE HOUSTON,	§	
Plaintiff,	§	
VS.	§	NO. 4;93-CV-678-A
ALL SAINTS HEALTH	§	
CARE, INC., D/B/A	§	
ALL SAINTS EPISCOPAL	§	
HOSPITAL, ET AL,	§	
Defendants.	§	

ORDER

Came on for consideration the motions of defendant Jenny McNeil (McNeil") to dismiss the Title VII claims asserted against her by plaintiff, Pamela Sue Houston, in plaintiff's second amended complaint. McNeil brings the motion in both her individual capacity and as surgical supervisor. The court, having considered the motion, plaintiff's response, the record, and applicable authorities, finds that the motion should be granted in part. Plaintiff's claims against McNeil, individually, will be dismissed, as Title VII does not provide for liability against employees in their individual capacities. Grant v. Lone Star Co., 21 F.3d 649 (5th Cir.), pet. for cert. filed, 63 U.S.L.W. 3161 (U.S. August 25, 1994) (No. 94-365); Miller v. Maxwell's Int'l. Inc., 991 F.2d 583, 587-88 (9th Cir. 1993), cert. denied. 114 S. Ct. 1049 (1994). Therefore,

The court ORDERS that McNeil's motion to dismiss be, and is hereby, granted in part and plaintiff's claims brought under Title VII against McNeil, individually, be, and are hereby, dismissed.

SIGNED September 21, 1994.

"S/ J McBryde "
JOHN McBRYDE
United States District Judge

APPENDIX C

Determination of the City of Fort Worth Human Relations Commission 28a

CITY OF FORT WORTH, TEXAS
Certified Return Receipt
#P 374 691 856

HUMAN RELATIONS COMMISSION
1000 THROCKMORTON STREET
FORT WORTH, TEXAS 76102

June 03, 1993

Ms. Pamela Sue Houston
3228 Bunkerhill Drive
Fort Worth, Texas 76140

Re: Pamela Sue Houston vs. All Saints Episcopal Hospital
HRC Charge No. 31A92019
EEOC Charge No. 31A920019
Date Filed: October 15, 1991
Date Served: October 17, 1991

DETERMINATION

Dear Ms. Houston:

Under the authority vested in me by Section 4, of the City of Fort Worth's Fair Employment Ordinance No. 7278, as amended, I issue on behalf of the Commission, the following findings as to the merits of the subject charge.

The timeliness, deferral and all other jurisdictional requirements having been met, the Respondent is an employer within the meaning of Employment Ordinance No. 7278 and Title VII.

The Charging Party alleges that the Respondent discriminated against her, in violation of the City of Fort Worth's Fair Employment Ordinance No. 7278, as amended, and of Title VII of the Civil Rights Act of 1964, as amended, because of her race, Black. Specifically, the Charging Party contends that her merit pay increase was only 3% due to her absences, even though she had scored 105% on her performance rating. The Charging Party contends she was treated differently in that she was required to push occupied bed stretchers and not relieved for breaks/lunch breaks. The Charging Party also contends she was subjected to a racially harassing atmosphere.

The Respondent's officials deny the allegations of discrimination and contend that the doctor who the charging Party accuses of racially derogatory statements was not an employee of theirs. The Respondent contends they have taken steps to raise individual physician awareness in the worksite concerning racial comments.

The findings indicate that a similarly situated Caucasian nurse received a 3% merit increase after being rated "E" in attendance and 55 points in performance. The Charging Party also received a 3% merit increase after being rated "E" in attendance, but with over 100 points in performance. The findings indicate the Charging Party returned from an on-the-job injury on May 31, 1991 with a doctor's recommendation to continue her duties and to obtain assistance with transporting stretchers if needed. The evidence indicates that the Charging Party was required to push occupied bed stretchers in spite of these doctor's requirements. Witness testimony indicates that no similarly situated non-Black comparables were pulled from their normal duties and required to push stretchers as the Charging party was. Witness testimony indicates that the Charging Party was not given assistance in pushing the occupied bed stretchers.

The evidence indicates that the Charging Party was treated differently than similarly situated non-Black employees in that she was not relieved for breaks/lunch breaks. The evidence also indicates that during July/August 1991, the Charging party complained to management of the racial comments/jokes made by a Caucasian doctor. Witness testimony supports the Charging Party's allegation regarding racially derogatory statements having been made by a Caucasian doctor with whom the Charging Party worked. No evidence was found to indicate that the Respondent took any action to correct these conditions prior to the Charging Party's complaint.

Examination of the evidence indicates that there is reasonable cause to believe the allegation to be true. No finding is made to any other issue raised, or which might be construed to have been raised by the subject charge.

Having determined that there is reasonable cause to believe that the law has been violated, I now invite the parties to join with the Commission in a collective effort toward a joint resolution of the matter and to eliminate unlawful employment practices. A representative of the Commission will contact each party in the near future to begin the conciliation process; until then, no action is required.

On Behalf of the Commission:

"S/ Michael D. Ivey "
Michael D. Ivey
Interim Executive Director
Fort Worth Human Relations Commission

MKI: lkw
cc: All Saints Episcopal Hospital
file

APPENDIX D

EEOC Notice of Right to Sue 31a

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

NOTICE OF RIGHT TO SUE

(Issued on Request)

TO:	FROM:
Pamela Sue Houston	EEOC District Office
3228 Bunkerhill Drive	207 S. Houston Street
Ft. Worth, Texas 76140	Dallas, Texas 75202
CHARGE NUMBER	EEOC REPRESENTATIVE
31A 92 0019	Myra Burns, Commission Rep.
TELEPHONE NUMBER	(214) 655-3398

TO THE PERSON AGGRIEVED:

This is your NOTICE OF RIGHT TO SUE, it is Issued at your request. If you intend to sue the respondent(s) named in your charge, YOU MUST DO SO WITHIN NINETY (90) DAYS OF YOUR RECEIPT O THIS NOTICE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

☒☒ More than 180 days have expired since the filing of this charge.

☒☒ With the issuance of this Notice of Right to Sue, the Commission is terminating its process with respect to this charge.

An information copy of this notice of Right to Sue has been sent to the respondent(s) shown below.

cc: (to respondent) On Behalf of the Commission

"S/ Janet V. Elizondo, " 12/15/93

Janet V. Elizondo, Enforcement Manager

Mr. John Milburn	Rebecca A. Singer
All Saints Hospital	Fulbright and Jaworski
1400 8th Avenue	2200 Ross Avenue, Suite 2800
Ft. Worth, Texas 76101	Dallas, Texas 75201

OCT 18 1995

(2)

Supreme Court, U.S.
FILED
SEP 28 1995
OFFICE OF THE CLERK

No. 95-357

In The

Supreme Court of the United States

October Term, 1995

PAMELA HOUSTON,

Petitioner,

v.

ALL SAINTS HEALTH SYSTEM, INC., JENNY McNEIL, and DR. KENNETH PEARCE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ALL SAINTS HEALTH SYSTEM AND JENNY McNEIL

RICHARD M. KOBDISH*
REBECCA A. SINGER
R. S. GHIO
FULBRIGHT & JAWORSKI L.L.P.
2200 Ross Avenue, Suite 2800
Dallas, Texas 75201
(214) 855-8000 (telephone)
(214) 855-8200 (fax)

Counsel for Respondents All Saints Health System and Jenny McNeil

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

41 pp

QUESTIONS PRESENTED

1. Whether Plaintiff's contention that All Saints Health System ("All Saints") is liable under Title VII of the Civil Rights Act of 1964 for the conduct of a non-employee staff physician properly is before this Court on a Petition for Writ of Certiorari since both the District Court and the Circuit Court of Appeals expressly found that they did not need to reach that issue in rendering their decisions?

2. If such issue properly is before this Court, is a hospital liable under Title VII for the allegedly harassing conduct of a non-employee staff physician directed toward a nurse employed by the hospital?

3. Whether All Saints took prompt remedial action in response to Petitioner's complaint of harassment, and thus absolved itself of liability under Title VII, when Petitioner's supervisor, immediately upon becoming informed of allegedly harassing conduct by a staff physician, verbally reprimanded said physician and the physician thereafter no longer engaged in said conduct?

4. Whether summary judgment is an appropriate procedural vehicle for dismissing claims under Title VII where the plaintiff fails to raise any material issue of fact that she suffered sex discrimination under Title VII?

5. Whether a staff physician, who is neither an agent nor an employee of a hospital, may be held personally liable under Title VII?

QUESTIONS PRESENTED – Continued

6. Whether the decision of the Fifth Circuit herein creates a conflict among the Circuit Courts of Appeals subject to review on the question of whether agents or supervisors may be held directly liable under Title VII?

PARTIES TO THE PROCEEDING

Respondents, All Saints Health System, Jenny McNeil, and Dr. Kenneth Pearce and Petitioner, Pamela Houston. All Saints Health System has no parent company or subsidiaries other than one wholly-owned subsidiary.

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No. 95-357

In The

Supreme Court of the United States

October Term, 1995

PAMELA HOUSTON,

Petitioner,

v.

ALL SAINTS HEALTH SYSTEM, INC., JENNY McNEIL, and DR. KENNETH PEARCE,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ALL SAINTS HEALTH SYSTEM AND JENNY McNEIL

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, provides that it is unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individuals's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below.

Petitioner, Pamela Sue Houston (hereafter "Houston"), filed suit on August 20, 1993 in Texas state court against EBI Companies (later dismissed by agreement), All Saints Health Care, Inc. d/b/a All Saints Hospital ("All Saints" and/or the "Hospital"),[1] Jenny McNeil ("McNeil") and Dr. Kenneth Pearce, M.D. ("Dr. Pearce"),[2] alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"); 42 U.S.C. § 1981; the Texas Workers' Compensation Act, Tex. Rev. Civ. Stat. Ann. Art. 8307c; the Texas Constitution; and various common law torts. (Vol. I at 7-22.)[3]

On October 8, 1993, Respondents All Saints and McNeil filed a Notice of Removal to the United States

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[1] This Respondent now is identified by Houston as All Saints Health System, Inc. However, the correct name is All Saints Health System. (Vol. VII at 1453 (no. 1)).

[2] All Saints and McNeil had joint counsel. Dr. Pearce was, and is, represented by separate counsel.

[3] Citations to the original record on appeal shall first refer to the volume, and then to the page or pages, and where appropriate, lines or paragraphs, in that volume.

District Court for the Northern District of Texas pursuant to 28 U.S.C. § 1331. (Vol. I at 1-6.) On April 19, 1994, Houston filed her Second Amended Complaint, which pled out EBI Companies as a party and alleged unlawful employment practices, including racial and sexual harassment, race discrimination, and retaliatory discharge by the remaining defendants. (Vol. I at 189-203.) All Saints and McNeil filed amended answers asserting that Dr. Pearce was not an agent of All Saints and that Houston failed to exhaust her administrative remedies, as well as numerous other defenses. (Vol. IV at 889-99.)

On August 31, 1994, All Saints and McNeil filed their Motion for Partial Summary Judgment and Brief in Support Thereof (Vol. III at 436-684), as well as McNeil's Motion to Dismiss (Vol. II at 432-35).[4] Also, on August 31, 1994, Dr. Pearce filed his Motion for Summary Judgment and supporting Brief. (Vol. IV at 694-880.)

On September 29, 1994, the District Court entered an order granting All Saints' and McNeil's Motion for Partial Summary Judgment to the extent that Houston, through a Pretrial Order signed on September 28, 1994, had abandoned certain claims addressed in said Motion. (Vol. VI at 1320; Vol. VII at 1481-82; Vol. VIII at 5.)

On October 7, 1994, the District Court issued its Memorandum Opinion and Order granting All Saints' and McNeil's Motion for Partial Summary Judgment (Vol. VII at 1480-88), and entered a final judgment dismissing

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[4] McNeil's Motion to Dismiss the Title VII claims against her was granted by the District Court's Order of September 21, 1994 (attached hereto as Appendix 1). This Order has *not* been appealed by Houston, and therefore there is no issue before the Court as to whether McNeil is individually liable under Title VII.

the remainder of Houston's claims (Vol. VII at 1499).[5] Houston filed her Notice of the Appeal to the Fifth Circuit on October 21, 1994. (Vol. VII at 1490-91, 1506-07.) On April 21, 1995, the Fifth Circuit, without oral argument, issued an unpublished opinion upholding the District Court's summary judgment order. (*See* Appendix A to Petition for Writ of Certiorari.)

B. Statement of Facts.[6]

Houston was employed by All Saints from April, 1984 to August 21, 1991 as a registered nurse in the surgery department's Holding Room, where patients were brought prior to being taken into the operating room or "surgical suites." (Vol. III at 455; *see also* Vol. I at 190-92.) Dr. Kenneth Pearce was an anesthesiologist and an officer of Anesthesia Care, Inc. ("ACI"), a company which contracted with All Saints to provide anesthesia services to the Hospital's patients. As such, Dr. Pearce had physician staff privileges at the Hospital but was not an employee thereof. As a Holding Room nurse, Houston worked on occasion with Dr. Pearce, although Dr. Pearce was not her employer or supervisor. (Vol. III at 450-51, 455; Vol. VI at 1260-61; Vol. VII at 1453 (no. 1), 1454 (nos. 4 and 5), 1466 (nos. 85-93), 1468 nos. (104-09), 1469 (nos. 110-15).) From approximately April, 1990 to August 21, 1991, Houston's supervisor was Jenny McNeil, Surgical

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[5] The only claims addressed in Houston's Petition for Certiorari are the discrimination and harassment claims under Title VII. None of her other claims, including those of retaliation under Title VII and the Texas Workers' Compensation Act, have been preserved for appeal.

[6] All Saints notes that Houston has not cited to the record for any of the supposed facts in her statement of such, at pp. 7-10 of her Petition.

Nurse Supervisor. (Vol. III at 455; Vol. VI at 1260-61; Vol. VII at 1469 (no. 110).)

In or around July of 1991, Houston complained to McNeil that Dr. Pearce had made a comment to her which she found racially offensive. (Vol. III at 458; Vol. VII at 1454 (no. 7).)[7] McNeil assured Houston that she would address the complaint. Thereafter, McNeil immediately reported this incident to the then Director of Surgical Services, Geraldine Petersen, who confirmed that McNeil's proposed course of action – counseling Dr. Pearce to cease making any racial remarks – was appropriate. (Vol. III at 458; Vol. VII at 1454 (no. 7), 1455 (no. 8), 1463 (no. 65).) Thus, McNeil immediately met with Dr. Pearce regarding the incident, stating that racially offensive language would not be tolerated and telling him to cease any such conduct. Dr. Pearce agreed to refrain from using such language. *Id.*

After leaving the meeting, McNeil talked to Houston and informed her of the conversation with Dr. Pearce, including that she had told Dr. Pearce to cease making racially offensive comments. *Id.* It is undisputed that McNeil received *no* other complaints from Houston, nor anyone else, about Dr. Pearce after that time. (Vol. III at 459; Vol. VII at 1455 (no. 9).) In fact, Houston's single complaint about Dr. Pearce was the *only* time that anyone ever had complained to McNeil about Dr. Pearce making racially offensive comments. (Vol. III at 458-59; Vol. VII at 1460 (no. 40).) Houston admitted that, following this reprimand, Dr. Pearce's conduct towards her improved, and he did not make any further racial comments to her. (Vol. III at 563; Vol. VII at 1461 (no. 48).)

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[7] Houston has admitted that she complained *only* about *racially* offensive comments, and made no mention of any sexually offensive comments or behavior. (Vol. III at 553:4-9; *see also* Vol. III at 459.)

On or about August 21, 1991, Houston allegedly injured her back while pushing an occupied stretcher into the operating room. This was the last day Houston ever reported for work at All Saints. (Vol. I at 192-93, ¶13.) Houston filed a workers' compensation claim for her alleged injury shortly after the incident. (Vol. I at 193, ¶14.) On October 15, 1991, Houston filed a charge with the Equal Employment Opportunity Commission ("EEOC") and the deferral agency, the Fort Worth Human Rights Commission ("FWHRC"), alleging that she had been harassed and discriminated against on the basis of her *race* as follows:

(1) receiving a "low" merit raise on April 15, 1991;

(2) being required to transport patients to their surgical rooms; and

(3) harassment by Dr. Pearce with no response by McNeil to Houston's complaint of such.

(Vol. III at 578-79.)

On June 18, 1992, the Hospital wrote to Houston informing her that, as she had reached maximum medical improvement on June 1, 1992 (according to the Texas Workers' Compensation Commission), and had not returned to work, she was being placed on "nonactive status" or a "leave of absence." The letter noted that, under such status, Houston could continue her benefits and apply for any other available position which she could perform.[8]

However, as noted in the letter, pursuant to Hospital policy, Houston could remain on leave only for one year,

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[8] Prior to this letter, Houston actually was offered another job position, at her pre-injury rate of pay. She was informed that the Hospital would accommodate her doctor and therapy appointments and would work to modify her job duties as necessary. (Vol. III at 651-54; Vol. V at 1064-66.)

after which time she would be removed from the employment rolls. (Vol. III at 598-99, 601.)

By letter of June 11, 1993, the Hospital notified Houston that her leave of absence had expired and, pursuant to Hospital policy, All Saints was removing her from the active employee roster. This letter noted that Houston had not applied for any other job at All Saints during her leave, but that she would be eligible for rehire should she choose to apply for another position in the future. (Vol. III at 598-99, 602.) Thus, Houston was taken off the Hospital's roster in June of 1993 due solely to the expiration of Houston's leave under All Saints' absence control policy.

SUMMARY OF REASONS FOR DENYING THE WRIT

Houston's Petition for Writ of Certiorari cannot survive even cursory scrutiny. Generally, where a petitioner seeks review of a Court of Appeals decision on a writ of certiorari, the Court will take into account the following considerations:

1) Whether the decision below conflicts with the decision of another Court of Appeals on the same matter, conflicts with a state court of last resort, or "has so far departed from the accepted and usual course of proceedings . . . as to call for an exercise of this Court's power of supervision"; or
2) Whether the lower court "has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court."

Sup. Ct. R. 10.1(a) and (c). The Fifth Circuit decision addressed herein implicates none of these considerations.

First, Houston devotes a substantial portion of her Petition to an issue that was *never reached* by the lower

courts, namely, whether All Saints is liable for the alleged conduct of Dr. Pearce. Both the District Court and the Fifth Circuit determined that they need not reach this issue because of their holding that All Saints promptly had remedied Houston's single complaint of harassment. Since such prompt remedial action absolved All Saints both of direct liability under Title VII, as well as indirect liability if Dr. Pearce were found to be an agent of All Saints, the question of whether Dr. Pearce actually was All Saints' agent or employee was superfluous. Thus, Houston improperly attacks a ruling that neither was made, nor needed to be made, by the courts below.[9]

Second, Houston argues that All Saints did not engage in prompt remedial action. This is the central issue addressed by the courts below, and both the District Court and the Fifth Circuit correctly held that the uncontroverted evidence, most notably Houston's *own admissions*, unequivocally demonstrates that McNeil took *immediate* action following Houston's complaint of harassment. Moreover, following McNeil's reprimand of Dr. Pearce, his behavior improved, and All Saints received no further complaints (from Houston or anyone else) of harassment by Dr. Pearce. Houston apparently urges a requirement that an employer take "severe retributive action" as opposed to "prompt remedial action," but there simply is not a shred of authority to support such a request.

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[9] However, as noted by the District Court below, even if the issue of All Saints' liability for Dr. Pearce's alleged conduct were to be examined, there is no evidence that Dr. Pearce acted as an agent of All Saints, and there is no probative evidence that All Saints knew or should have known of any alleged conduct by Dr. Pearce, other than Houston's lone complaint in 1991, which was resolved promptly. Petitioner's Appendix B at 22a n.7.

Third, Houston attempts to revive her sex discrimination claim *not* by challenging the Fifth Circuit's ruling that Houston failed to raise *any* evidence that McNeil's decision to require her to push stretchers was motivated by sex discrimination, but rather by arguing as a general proposition that summary judgment is not an appropriate means of resolving Title VII cases. This nonsensical argument is completely at odds with decisions from *every* Circuit Court of Appeals, and, if it were to become law, essentially would guarantee that each and every Title VII plaintiff is entitled to a full civil trial, without regard to whether they can raise a genuine issue of material fact to support their claims. This result flies in the face of universal precedent among the federal courts.

Finally, Houston's argument that there is a split among the Circuits on the issue of whether supervisors or agents are individually liable under Title VII is entirely unconvincing. Houston essentially argues that, although the Fifth Circuit has held, both in the decision below and in other cases, that a supervisor or agent can be held individually liable under Title VII (the result which Houston urges), a decision out of the *Ninth* Circuit has held the opposite, thus creating a split among the Circuits. Why this requires review by this Court is a mystery. The ruling with which Houston takes issue is that of a different circuit in an entirely unrelated case. Houston does *nothing* to challenge the rationale expressed by the Fifth Circuit herein that in order to find an individual liable under agency principles, a plaintiff must demonstrate that the individual was the employer's agent with respect to employment practices. This analysis is neither mentioned nor briefed by Houston, and therefore is not properly before this Court.[10]

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[10] Nor does Houston challenge the Fifth Circuit's ruling that no employment relationship existed between All Saints and Dr. Pearce.

REASONS FOR DENYING THE WRIT

I. THE QUESTION OF WHETHER ALL SAINTS IS LIABLE FOR THE CONDUCT OF DR. PEARCE IS NOT PROPERLY BEFORE THE COURT, AS NEITHER COURT BELOW RULED ON THIS ISSUE

A substantial portion of Houston's Petition is devoted to the argument that "the courts below failed to apply agency principles and held that the hospital could not be responsible for the conduct of Dr. Pearce since he was not an employee of the hospital." Petition at 13-14. Houston argues that such a ruling is erroneous and conflicts with this Court's decision in *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986).

Houston's argument fails for an elementary reason: neither court below ever made such a ruling. Rather, the Fifth Circuit held that because "All Saints took prompt remedial action in response to Houston's complaint, *we need not, and therefore do not, address the preliminary issue whether All Saints is even subject to liability for Dr. Pearce's actions through any employer-employee or principal-agent relationship.*" Petitioner's Appendix A at 6a n.11 (emphasis added).[11] Thus, the Fifth Circuit held that the issue of the Hospital's liability for the conduct of a staff physician was immaterial in the instant case, as the prompt remedial action by All Saints, discussed *infra*,

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[11] As discussed *infra*, the Fifth Circuit did address the relationship between All Saints and Dr. Pearce for the purpose of determining *Dr. Pearce's* liability, if any. Petitioner's Appendix A at 6a-9a. However, with respect to All Saints' liability as an employer, which is discussed in Section I (pp. 13-16) of the Petition and is the issue mentioned in *Meritor*, the Fifth Circuit held that it need not reach the nature of the relationship between All Saints and Dr. Pearce.

absolved the Hospital of liability both for its own actions as well as those of its agents or supervisors.

This closely follows the rationale of the District Court, wherein the judge concluded:

> In determining whether All Saints is indeed liable for Pearce's conduct, assuming plaintiff's allegations are true, the court need not reach the point of examining the legal relationship between them. That step is not necessary, because the summary judgment evidence shows that, whether or not Pearce was its employee, immediately after plaintiff complained of Pearce's conduct, All Saints reprimanded Pearce. Plaintiff did not thereafter make any complaint regarding Pearce's conduct and, in fact, admitted that his conduct toward her changed.

Petitioner's Appendix B at 22a-23a.[12]

Consequently, this question, which forms the cornerstone of Houston's Petition, is not properly before the Court. As this Court observed in *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1970), "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." 398 U.S. at 147 n.2, 90 S. Ct. at 1603 n.2 (citing, *inter alia*, *Lawn v. United States*, 355 U.S. 339, 362-63, 78 S. Ct. 311, 324-25 (1958)). *See also Singleton v. Wulff*, 428 U.S. 106, 120, 96 S. Ct. 2868, 2877 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed on below").

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[12] The District Court did state in *dicta*, however, that "[i]f such an examination was required, the court would find that there is insufficient summary judgment evidence adduced by plaintiff to create a fact issue as to an employer/employee relationship between All Saints and Pearce." Petitioner's Appendix B at 22a n.7.

II. EVEN IF ALL SAINTS' POTENTIAL LIABILITY FOR DR. PEARCE'S ALLEGED CONDUCT PROPERLY WERE BEFORE THIS COURT, THERE IS NO EVIDENCE TO SUPPORT PLAINTIFF'S CLAIM THAT DR. PEARCE WAS AN AGENT OF THE HOSPITAL

Even if All Saints' potential liability for Dr. Pearce's conduct properly were before this Court, which it is not, Houston's argument that Dr. Pearce was an agent of All Saints cannot withstand scrutiny.[13] Essentially, Houston argues in her Petition that "[t]he hospital placed Dr. Pearce in a position of authority which enabled him to engage in racial and sexual misconduct in the workplace and the hospital should be responsible for his unlawful harassment." Petition at 15. The only authority cited by Houston to support this proposition is *Meritor*, which Houston contends mandates the full application of common-law agency principles in the context of Title VII.

Houston's analysis simply misses the mark. First, her reliance on *Meritor* is misplaced. *Meritor* neither addressed nor contemplated the potential liability of an employer for conduct committed by *non*-employees.

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[13] Houston no longer argues that Dr. Pearce was a supervisory employee of All Saints, which she maintained before both courts below. Thus, the issue before the Court is narrowed to whether Pearce was an agent of All Saints. Further, Houston raises for the *first* time in her Petition the argument that, even if Pearce was not an agent of the hospital, All Saints is liable for his conduct as a non-employee, under the standards set forth in the Equal Employment Opportunity Commission ("EEOC") Guidelines. Petition at 14. This issue was *never* raised before the Fifth Circuit, and therefore cannot serve as a basis for granting a writ of certiorari. *See Berkemer v. McCarty*, 468 U.S. 420, 443, 104 S. Ct. 3138, 3152 (1984).

Rather, the Court in *Meritor* was faced with a circumstance in which the alleged harasser was the vice president and branch manager of the defendant corporation. *Meritor*, 477 U.S. at 59, 106 S. Ct. at 2401-02. Moreover, *Meritor* applied agency principles as a means of *limiting* an employer's liability, not expanding it. As the Court observed:

> Congress' decision to define "employer" to include any "agent" of an employer . . . surely evinces an *intent to place some limits* on the acts of employees for which employers under Title VII are to be held responsible.

Id. at 72, 106 S. Ct. at 2408 (emphasis added, citation omitted).[14]

Thus, the *Meritor* Court rejected the notion that employers automatically are liable for the conduct of all their supervisory employees. *Id.* Clearly, Houston's attempt to utilize agency principles as a means of *expanding* employer liability under Title VII is a corruption of the principles laid down in *Meritor*.

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[14] Nor did the *Meritor* Court "decide," as alleged by Houston, that "the question is not whether the supervisor or agent has been delegated employment decisions . . . but whether they have authority or the appearance of authority in the workplace." Petition at 14-15. This reasoning nowhere is included in the majority opinion. Rather, Houston relies upon her own misreading of the *concurring* opinion by Justice Marshall, in which he opined that where a supervisor has authority "vested" in him by the employer, the employer should be liable for the supervisor's conduct regardless of whether the employer had actual notice of such conduct. *Meritor*, 477 U.S. at 76-77, 106 S. Ct. 2410 (Marshall, J., concurring). This issue has nothing to do with the case at hand. Nor did Justice Marshall address the question of "actual" versus "apparent" authority. Thus, there is nothing in the language of the *Meritor* decision itself to support Houston's mischaracterization of it.

Moreover, the Court in *Meritor* expressly recognized that agency principles "may not be transferable in all their particulars to Title VII." *Id.* Subsequent to *Meritor*, each federal court that has addressed the agency question has held that "an agent under Title VII and the ADEA must be an agent with respect to employment practices."[15] Thus, in accordance with the language in *Meritor*, the lower federal courts have applied agency principles only where the authority delegated to the employee includes authority relating to employment decisions.

In the instant case, the uncontroverted summary judgment evidence conclusively demonstrates that All Saints vested Dr. Pearce with *no* authority relating in any manner to employment practices. Indeed, Houston admitted in her deposition that she had no idea what Dr. Pearce's relationship with the Hospital was, and she merely speculated that Dr. Pearce *either* was an employee *or* "had some type of contract with All Saints in order to be there." (Vol. III at 556.) Houston does not know who paid Dr. Pearce for his anesthesiology services, who billed his patients, or whether he received any monies or benefits from All Saints. (Vol. III at 498-500.) The summary judgment evidence reveals, however, that All Saints did not perform those activities for Dr. Pearce. (Vol. III at 451.) Finally, Houston admits that she never was informed that Dr. Pearce was an employee or agent of All Saints. (Vol. III at 556-57.)

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[15] *Deal v. State Farm County Mut. Ins. Co.*, 5 F.3d 117, 119 (5th Cir. 1993) (citing *York v. Tennessee Crushed Stone Ass'n*, 684 F.2d 360, 362 (6th Cir. 1982)); *Fike v. Gold Kist, Inc.*, 514 F.Supp. 722 (N.D.Ala. 1981), *aff'd* 664 F.2d 295 (11th Cir. 1981); *Konieczny v. Derickson*, 43 Fair Emp. Prac. Cas. (BNA) 251 (S.D.Ill. 1987). Tellingly, Houston neither cites the *Deal* decision, nor raises *any* argument that these decisions conflict in any manner with this Court's ruling in *Meritor*.

Indeed Houston's *only* "evidence" supporting her spurious argument is her own affidavit testimony, submitted *subsequent* to her deposition, to the effect that Dr. Pearce was "in charge" of the surgery department and "controlled" the surgical nurses. (Houston's Brief to the Fifth Circuit at 19, citing Vol. V at 981.)[16] However, Houston's obvious afterthoughts provided in the form of her belated affidavit cannot support a finding that Dr. Pearce was an agent of All Saints. First, Houston's attempt to *avoid* her prior testimony through a subsequent, and fundamentally inconsistent, affidavit does *not* raise a material issue of fact.[17] Consequently, Houston's affidavit testimony should *not* be considered by this Court.

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[16] Houston argues, without citation, that nurses sometimes were given orders by Dr. Pearce when they worked in the surgery department, and that she was told that he could have her fired. Petition at 7. The only possible source for these allegations is this same affidavit. (Vol. V at 981.) However, Houston admitted in her deposition, prior to her affidavit, that Dr. Pearce did *not* supervise her or the other nurses, did *not* order her around, did *not* evaluate her performance, did *not* set the schedules for the nurses, and could *not* fire her. (Vol. VI at 1219, 1221, 1231-33, 1260-63). Furthermore, on Houston's last day of deposition, she stated that she had reviewed this portion of her deposition and had no changes. (Vol. VI at 1272.)

[17] *See, e.g., Thurman v. Sears, Roebuck & Co.*, 952 F.2d 128, 136 n.23 (5th Cir. 1992); *Bank Leumi Le-Israel B.M. v. Lee*, 928 F.2d 232, 236-37 (7th Cir. 1992); *Van T. Junkins & Assoc., Inc. v. U.S. Indus., Inc.*, 736 F.2d 656, 657 (11th Cir. 1984) (non-movant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony).

Second, even if such affidavit is considered, it is completely undercut by Houston's own admissions and stipulations. Thus, the Fifth Circuit observed:

> Houston claims that her testimony to the effect that Dr. Pearce "took charge" of the surgery department, that the nurses obeyed his orders, and that she believed that Dr. Pearce could have her fired, is sufficient to present a genuine issue as to a material fact. We disagree with Houston's assertion. There is a *total absence* of any evidence in the record that Dr. Pearce had *any* input regarding Houston's employment conditions. The parties stipulated that Houston's direct supervisor was Ellen Baldwin, who reported to McNeil, and that Dr. Pearce did not set Houston's schedule, did not evaluate Houston's job performance, and did not have the authority to discharge any All Saints employee.

Petitioner's Appendix A at 7a-8a. In sum, not only is there no evidence in the record to support Houston's assertion that Dr. Pearce was an agent of the Hospital (other than her own speculative testimony), *all* of the competent evidence in the record clearly establishes that Dr. Pearce was *not* an agent of the Hospital with respect to Houston's employment conditions. Thus, the Fifth Circuit's decision in this regard is correct and does not merit a writ of certiorari.[18]

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[18] Houston curiously adds at the end of her argument regarding agency principles a discussion of hostile environment sex harassment under *Harris v. Forklift Systems, Inc.*, 510 U.S. ___, 114 S. Ct. 367 (1993), arguing that the "district court and the court of appeals did not look at all the circumstances [concerning alleged sex and race harassment] but only the one incident about which Petitioner complained to McNeil." Petition at 15. Once again, Houston simply misperceives the issues properly

III. THE FIFTH CIRCUIT CORRECTLY RULED THAT ALL SAINTS AND MCNEIL ARE NOT LIABLE FOR HARASSMENT UNDER TITLE VII BECAUSE THEY TOOK PROMPT REMEDIAL ACTION IN RESPONSE TO HOUSTON'S COMPLAINT

The Fifth Circuit recently has held that "when a company, once informed of allegations of sexual harassment, takes prompt remedial action to protect the claimant, the company may avoid Title VII liability." *Nash v. Electrospace Sys.*, 9 F.3d 401, 404 (5th Cir. 1993). This decision echoes the language of the EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(d) and (e).[19] Indeed, Houston makes *no* contention in her Petition that this is *not* the rule universally applied in federal

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before the Court, and misstates the lower court decisions. Neither the District Court nor the Fifth Circuit ever addressed whether Houston was, in fact, harassed, as each court found that regardless of the nature of Dr. Pearce's conduct, All Saints took immediate and effective remedial action. Importantly, this ruling rendered several arguments by *all* parties moot. For example, despite significant evidence that Houston's claims of sex discrimination and sex harassment were barred under Title VII because Houston failed to file an EEOC charge with respect to such allegations, the Fifth Circuit did not rule on that issue. *See Ray v. Freeman*, 626 F.2d 439, 442-43 (5th Cir. 1980), *cert. denied*, 450 U.S. 997 (1981). Rather, the court held: "As we have found no genuine issue of material fact supporting the merits of Houston's claims, however, we need not, and do not, address these procedural issues." Petitioner's Appendix A at 9a, n.21.

[19] Cited favorably by Justice Marshall in his concurring opinion in *Meritor*, 477 U.S. at 74, 106 S. Ct. at 2409, which concurrence frequently is relied upon by Houston herein as authoritative.

courts. In the case at bar, the Fifth Circuit ruled that All Saints and McNeil took such remedial action:

> After Houston informed McNeil of Dr. Pearce's offensive behavior, McNeil assured Houston that she would address the matter and *immediately* reported the complaint to [Geraldine] Peterson, the Director of Surgical Services, who told McNeil that her planned reprimand of Dr. Pearce was the appropriate course of action. McNeil *wasted no time* in meeting with Dr. Pearce, telling him that racially offensive language would not be tolerated, and counseling him to cease making racist comments to Houston. After the meeting, Houston was promptly informed by McNeil of just how she had dealt with Houston's complaint. Houston admitted in her deposition that after McNeil's meeting with Dr. Pearce, his behavior "toned down a lot" and that Dr. Pearce made no further racially offensive comments to her.

Petitioner's Appendix A at 5a (emphasis added). Houston now contends in her Petition that this holding is in error for two reasons, both of which must fail.[20]

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[20] An additional argument raised by Houston before the Fifth Circuit, but not herein, was that McNeil's reprimand did not constitute remedial action because McNeil was not a member of the administrative staff of the hospital. Houston's Brief to the Fifth Circuit at 16. The Fifth Circuit unceremoniously disposed of this argument:

> We disagree, particularly in light of the effectiveness of McNeil's reprimand. McNeil's talk with Dr. Pearce, which occurred shortly after McNeil received Houston's complaint, succeeded in putting an immediate and permanent stop to Dr. Pearce's offensive comments aimed at Houston. McNeil's technical authority in relation to Dr. Pearce is, therefore, irrelevant . . . .

Petitioner's Appendix A at 5a-6a.

First, Houston argues that the remedial action "was not prompt or immediate since [Dr. Pearce] had been engaging in sexual and racial harassment for years." Petition at 20. To support this claim, Houston alleges, without any citation to the record, that "McNeil and nurse director Petersen had been aware of Dr. Pearce's conduct for years." Petition at 19. This statement simply is false. First, Houston *stipulated* at the District Court level that she *never* complained about *sexually* harassing conduct to *anyone* at All Saints. (Vol. III at 459 (no. 8), 548-49, 553; Vol. VII at 1455 (no. 10).) Further Houston *admitted* that her supervisors would have had no reason to know she was offended by Dr. Pearce's comments prior to her July, 1991 complaint to McNeil. (Vol. III at 550-51.) Thus, Houston's contention in her Petition is undercut by all of the evidence in the record, including her own unambiguous admissions.

Second, Houston argues that the remedial action "was not effective because [Dr. Pearce's] conduct continued." Petition at 20. Once again, Houston points to nothing in the record to support her claim, and indeed she cannot, as her own admissions completely contradict her current representations to this Court. Houston *admits* that Pearce made *no further* racially offensive comments to her after being reprimanded by McNeil. (Vol. III at 563.) Houston also testified that after the reprimand, Pearce "was quiet. He had toned down a lot." *Id.* Houston further admits that she has *no opinion* about whether the action taken by McNeil was satisfactory. (Vol. III at 561-62.) Finally, after this isolated complaint, Houston *never again complained* to All Saints or McNeil, or put them on notice in any manner, that any harassing conduct allegedly was continuing. (Vol. III at 459, 564.)[21] In

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[21] Indeed, Houston stipulated in the Joint Pretrial Order: "After July, 1991, neither Dr. Pearce nor anyone else connected

essence, as the Fifth Circuit found, Dr. Pearce's alleged conduct was put to "an immediate and permanent stop." Petitioner's Appendix A at 6a. Thus, as Dr. Pearce's behavior improved and Houston no longer complained, All Saints had no reason to believe that its remedial efforts were anything less than effective, as indeed those measures had solved the problem.

Houston makes vague reference in her Petition to *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C.Cir. 1981) for the proposition that "an employer should promptly take all necessary steps to investigate and correct any harassment, including warnings and appropriate discipline directed at the offending party." Petition at 20.[22] However, Houston does not explain what additional steps she believes the Hospital should have taken. In *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989), the Fifth Circuit held that "[w]hat is appropriate remedial action will necessarily depend on the *particular facts* of the case – the severity and persistence of the harassment, and the effectiveness of any initial remedial steps." *Id.* at 479 (emphasis added). Thus, where, as here, initial remedial steps *are* effective, no additional steps should be required.

Clearly, "Title VII does not require that an employer use the most serious sanction available to punish an offender." *Landsgraf v. USI Film Prods.*, 968 F.2d 427, 430 (5th Cir. 1992), *aff'd in part*, 114 S. Ct. 1483 (1994). Rather, as the Fifth Circuit held below, "the effectiveness of any

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with All Saints made any racial or sexual comments, or engaged in any sexual or racial conduct, towards Plaintiff in connection with her work at the Hospital." (Vol. VII at 1461 (no. 48).)

[22] This reliance is misplaced. In *Bundy*, as opposed to the instant case, the court found that the employer "had full notice of harassment committed by agency supervisors and did *virtually nothing* to stop or even investigate the practice." 641 F.2d at 943 (emphasis added).

initial remedial steps taken by the employer is an important factor in assessing what constitutes appropriate remedial action." Petitioner's Appendix A at 5a (citing *Waltman*, 875 F.2d at 479). Thus, the Fifth Circuit's ruling that the verbal reprimand constitutes prompt remedial action because Dr. Pearce ceased his allegedly harassing conduct immediately thereafter, is consistent with the relevant case law and need not be reviewed on certiorari.

IV. THE COURTS BELOW PROPERLY DISPOSED OF PLAINTIFF'S CLAIM OF RACE DISCRIMINATION ON SUMMARY JUDGMENT

Houston's Petition also focuses on her allegation that All Saints and McNeil discriminated against her on the basis of her race (African American) by "chang[ing] Petitioner's job duties by ordering her to transport all surgery patients from the holding room into the operating rooms without assistance from the orderlies or other nurses." Petition at 9. Essentially, Houston alleges that pushing stretchers was a job function previously performed by white male orderlies, and that by being required to push stretchers, she was unable to adequately perform her other job duties. *Id.*

The Fifth Circuit, however, held that "the summary judgment evidence does not reveal that discrimination had anything to do with McNeil's actions in requesting Houston to push patient stretchers." Petitioner's Appendix A at 9a. Specifically, the Fifth Circuit agreed with the District Court that All Saints had established a legitimate, nondiscriminatory reason for McNeil's decision, and that Houston failed to demonstrate that this reason was a pretext for discrimination. *Id.* at 10a. Houston apparently argues that this decision was in error for two reasons: first, she asserts that summary judgment is an inappropriate vehicle for resolving sex discrimination cases under Title VII; and second, she contends that she had

raised a genuine issue of material fact concerning race discrimination. Neither of these arguments has any merit.

A. Summary Judgment is a Proper Procedural Vehicle for Dismissing Title VII Claims When a Plaintiff Fails to Raise a Genuine Issue of Material Fact Supporting Her Claims.

Houston argues that the Fifth Circuit decision herein conflicts with several of this Court's previous decisions[23] by inappropriately applying Fed. R. Civ. P. 56 to a Title VII discrimination case. Although it is difficult to discern precisely Houston's rationale for this argument, it appears to have three components. First, Houston argues that the Fifth Circuit improperly "held that Petitioner, the non-movant, had the burden to prove that there were genuine issues of material fact." Petition at 16. Second, she contends that "the court of appeals erroneously applied the burden of proof rule of *McDonnell Douglas Corp. v. Green* to a summary judgment proceeding depriving Houston of her right to demonstrate to a jury that the hospital's reason for disparate treatment is a pretext." *Id.* at 17 (citation omitted). Third, Houston states, with *no* supporting authority, that "[e]mployment discrimination cases involve subjective questions of motivation and intent which can only be proven by circumstantial evidence. It is arguable that summary judgment is a questionable procedure in such cases" as it operates to denigrate the role of the jury. *Id.* at 18. The Court need look no further than the language of the cases cited by

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[23] The cases cited by Houston are *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973); and *Adickes v. H.S. Kress and Co.*, 398 U.S. 144, 90 S. Ct. 1598 (1969). Significantly, Houston does not quote a *single word* from any of these decisions to support her arguments.

Houston herself to conclude that her arguments are entirely lacking in support.

1. The Fifth Circuit properly applied *Celotex* in allocating the burden of proof on summary judgment motions.

Plaintiff mischaracterizes this Court's ruling in *Celotex* and argues that the Fifth Circuit, in resolving All Saints' and McNeil's Motion for Partial Summary Judgment, improperly placed the burden of proof on Houston, the nonmoving party. Houston's tortured reading of *Celotex*, however, is unconvincing. There, this Court ruled that a movant for summary judgment only has the "initial responsibility of informing the district court of the basis for its motion" and identifying those portions of the pleadings, affidavits, etc., "which it believes demonstrate the absence of a genuine issue of material fact." 477 U.S. at 323, 106 S. Ct. at 2553. The Court continued:

> [W]e find no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim.

Id. (emphasis in original). This led to the Court's holding, alluded to by Houston, that "the burden on the moving party may be discharged by . . . pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325, 106 S. Ct. at 2554.

Thus, the central holding of *Celotex* was a *rejection* of the Court's previous holding in *Adickes* that the burden of proof is on the movant to *prove* "the absence of any genuine issues of material fact." *Id.* at 322, 106 S. Ct. 2552 (citing *Adickes*, 398 U.S. at 159, 90 S. Ct. at 1609). Instead, the Court ruled that once the movant had "shown" or "pointed out," even without supporting affidavits, the

absence of a genuine issue of fact, the burden rests squarely on the non-movant:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex, 477 U.S. at 322, 106 S. Ct. 2552. Thus, once All Saints and McNeil pointed out, through their Motion for Partial Summary Judgment, the absence of a genuine issue of material fact, the burden was on Houston to establish that such an issue existed for each essential element of her case. As demonstrated *supra*, with respect to issues of harassment, and *infra*, with respect to issues of discrimination, Houston failed to meet this burden, and summary judgment appropriately was entered against her.

2. *McDonnell Douglas* applies to summary judgment proceedings, and summary judgment is appropriate in employment discrimination cases.

Houston's argument that this Court's seminal decision in *McDonnell Douglas* does not apply to summary judgment proceedings is not supported by any case authority, and none is cited by Houston. Indeed, *every* Circuit Court of Appeals has applied *McDonnell Douglas* in the summary judgment context.[24] Thus, certiorari on this issue is unnecessary.

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[24] *See, e.g., LeBlanc v. Great American Ins. Co.*, 6 F.3d 836 (1st Cir. 1993), *cert. denied*, 114 S. Ct. 1398 (1994); *LaFond v. General Physics Servs. Corp.*, 50 F.3d 165, 172 (2d Cir. 1995); *Jackson v. University of Pittsburgh*, 826 F.2d 230, 233-34 (3d Cir. 1987), *cert. denied*, 484 U.S. 1020 (1988); *Tuck v. Henkel Corp.*, 973 F.2d 371, 375 (4th Cir. 1992), *cert. denied*, 113 S. Ct. 1276 (1993); *Moore v. Eli*

3. The summary judgment granted herein did not usurp the role of the jury.

In a similar vein, Houston offers *no* supporting authority for her conclusion that "it is arguable that summary judgment is a questionable procedure" in employment discrimination cases. This argument is completely contrary to the policy set forth in *Celotex*. There, the Court observed:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy, and inexpensive determination of *every* action."

Celotex, 477 U.S. at 327, 106 S. Ct. at 2555 (quoting Fed. R. Civ. P. 1). Thus, Title VII cases should be subject to the same analysis as any other federal court lawsuit: when a party fails to raise a genuine issue of material fact, summary judgment should be entered against him.

In a related argument, Houston suggests that the district courts are running amok and "using Rule 56 . . . as authority for a 'trial on affidavits.' " Petition at

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Lilly & Co., 990 F.2d 812, 817 n.24 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 467 (1993); *Canitia v. Yellow Freight Sys.*, 903 F.2d 1064, 1066 (6th Cir. 1990), *cert. denied*, 498 U.S. 984 (1990); *Cherry v. American Tel. & Tel. Co.* 47 F.3d 225, 229 (7th Cir. 1995); *Rinehart v. City of Independence*, 35 F.3d 1263, 1264 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 1822 (1995); *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1465 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 733 (1995); *Martin v. Nannie & Newborns*, 3 F.3d 1410, 1417 (10th Cir. 1993); *Edwards v. Wallace Community College*, 49 F.3d 1517, 1520-21 (11th Cir. 1995); *Jones v. Firestone Tire & Rubber Co.*, 977 F.2d 527, 536 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 2932 (1993); *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *petition for cert. filed*, 64 USLW 3068 (1995).

22. According to Houston, the granting of summary judgment, particularly in employment discrimination cases, tends to "denigrate the role of the jury." *Id.* at 18. Houston's hyperbole fails for two reasons. First, the argument does not go to the question of whether, in the *instant* case, summary judgment was appropriate. Second, Houston's argument previously has been considered and rejected by this Court. The *Celotex* Court continued:

> Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses *that are adequately based in fact* to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

477 U.S. at 327, 106 S. Ct. at 2555 (emphasis added). Thus, Houston cannot evade her burden of demonstrating a genuine issue of material fact merely by postulating that Rule 56 is a bad idea.

B. Summary Judgment Was Appropriate Herein Because Houston Failed to Raise a Genuine Issue of Material Fact to Support Her Claim of Discrimination

Without citing to or quoting a single word from the summary judgment record, Houston asserts that McNeil's request that Houston push occupied stretchers was "an act of overt discrimination" and that "the discrimination was patently obvious in purpose or effect." Petition at 17, 19. Unfortunately for Houston, as the Fifth Circuit concluded, "Houston did not produce *any evidence*, showing that McNeil's motivation for ordering Houston to push

the stretchers was discriminatory." Petition's Appendix at 10a (emphasis added).[25]

Houston's assertion that pushing stretchers was not a part of the job duties of a nurse grossly misstates the evidence before the trial court, and in fact contradicts her own sworn testimony. Houston admits in her deposition that patients were transported to the recovery room by the "circulating nurse," nurse anesthetists, or other nurses. (Vol. III at 474:18-22.) Houston further admits that this included *white* nurses. (Vol. III at 475, 478-79.) Also, Houston admits that from the inception of her employment at All Saints, she was required to assist in pushing stretchers. (Vol. III at 476:11-21, 487; Vol. VI at 1264.) Thus, all of the competent summary judgment evidence forecloses Houston's attempts to establish a *prima facie* case of discrimination.

Even if pushing stretchers was not part of Houston's original job duties (which it was), Houston cannot rebut All Saints' legitimate, nondiscriminatory reason for requiring her to perform this duty. As was explained to the courts below, prior to Houston being required to push stretchers, the transportation of patients into the operating rooms generally was handled by orderlies. However, because of the necessity of a sterile environment, orderlies were required to leave patients in the hallway while the orderlies put on head and shoe covers to enter the

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[25] In a feeble attempt to create an issue of fact, Houston asserts, "Petitioner called to the attention of the court in her discovery response [sic] the names of nurses, supervisors, and physicians she *intended* to call as witnesses to Dr. Pearce's behavior." Petition at 16 (emphasis added). The trouble is, Houston never produced this testimony, in affidavit form or otherwise. Houston thus suggests that summary judgment should be denied where the non-movant can point to a list of people who *might* testify on her behalf. Such clearly is not the law.

surgery suite. (Vol. III at 456, 502-03, 509.) This resulted in delays in delivering patients to the operating rooms and, consequently, delays in the starting time of the surgical procedures. Therefore, at the suggestion of the orderlies, McNeil asked that Houston, who worked in the Holding Room and already was dressed in a sanitary manner, retrieve the 7:30 a.m. patients from the orderlies and take them to the operating room herself. This helped ensure that patients were delivered on time for their surgeries. (Vol. III at 456; Vol. V at 1046.) Indeed, Houston has *admitted* that she was asked to push stretchers in order to "speed the process up." (Vol. III at 558-59.)

Houston asserts in her Petition that this reason is a pretext, but points to no proof in the record. Significantly, Houston has admitted that she *does not know* whether All Saints' proffered reason for asking her to perform the task was true. (Vol. III at 559-60.) Thus, Houston has *no* evidence of pretext other than her own subjective belief that the real motivation was discrimination, which is insufficient to meet her burden.[26] *See, e.g., Molnar v. Ebasco Contractors, Inc.*, 986 F.2d 115, 119 (5th Cir. 1993).

V. THE DECISION BELOW DOES NOT CREATE A SPLIT AMONG THE CIRCUITS SUBJECT TO REVIEW WITH RESPECT TO WHETHER AGENTS AND SUPERVISORS ARE INDIVIDUALLY LIABLE UNDER TITLE VII

Houston argues that this case creates a conflict among the Circuits as to whether agents or supervisors are liable under Title VII. However, Houston's argument

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[26] To hold otherwise would be to expose employers to Title VII suits any time an employee was required to perform a task which previously was not delineated on a job description. Such a result would unreasonably handcuff employers and, in the case of hospitals, interfere with the prompt treatment of patients.

is fraught with fundamental flaws. First, the Fifth Circuit did *not* hold that agents and supervisors are not liable under the statute; rather, the court properly held, as explained *supra*, that Dr. Pearce was not All Saints' agent. Nothing in the decision below precludes liability for agents or supervisors when a plaintiff actually can demonstrate that the individual *was* an agent or supervisor.[27]

Second, the Fifth Circuit already *does* permit liability for agents and supervisors under particular circumstances, as Houston herself recognizes. *See* Petition at 21 (citing *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986)). Significantly, *this* is the rule that Houston believes should be followed. *Id.* at 21-22. However, Houston petitions for a writ of certiorari because a decision out of the *Ninth* Circuit takes the opposite view. *Id.* at 21 (citing *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583 (9th Cir. 1993)). Inexplicably, Houston seeks certiorari here to reverse a decision of *another* circuit, and to obtain a ruling that would have no effect upon the disposition of *this* case. Such hardly constitutes an appropriate circumstance for a writ of certiorari.

CONCLUSION

Houston's Petition rests precariously on a series of contrived arguments and fundamental misapplications of the relevant case law. Because the courts below properly ruled that Houston's claims are devoid of any factual support, she seeks certiorari of several issues *not* passed upon by the courts below which neither should nor need be considered herein. The central holding of the lower courts, that All Saints and McNeil took prompt remedial action in response to Houston's complaint of harassment,

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[27] Other than to allege a split among the Circuits, Houston does not brief the issue of Dr. Pearce's liability under Title VII.

is unassailable. Further, there is no evidence of a discriminatory animus in McNeil's decision to require Houston to push occupied stretchers.

Thus, the decision of the Fifth Circuit herein does not present any important, undecided issue of federal law. Moreover, Houston's attempt to create a conflict among the Circuit Courts is a transparent artifice. Therefore, certiorari should be denied.

Respectfully Submitted,

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

PAMELA SUE HOUSTON, Plaintiff,	§	
vs.	§	NO. 4:93-CV-678-A
ALL SAINTS HEALTH CARE, INC., D/B/A ALL SAINTS EPISCOPAL HOSPITAL, ET AL., Defendants.	§	

ORDER

(Filed Sep. 21, 1994)

Came on for consideration the motion of defendant Jenny McNeil ("McNeil") to dismiss the Title VII claims asserted against her by plaintiff, Pamela Sue Houston, in plaintiff's second amended complaint. McNeil brings the motion in both her individual capacity and as surgical supervisor. The court, having considered the motion, plaintiff's response, the record, and applicable authorities, finds that the motion should be granted in part. Plaintiff's claims against McNeil, individually, will be dismissed, as Title VII does not provide for liability against employees in their individual capacities. *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir.), *pet. for cert. filed*, 63 U.S.L.W. 3161 (U.S. August 25, 1994) (No. 94-365); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994). Therefore,

The court ORDERS that McNeil's motion to dismiss be, and is hereby, granted in part and plaintiff's claims brought under Title VII against McNeil, individually, be, and are hereby, dismissed.

SIGNED September 21, 1994.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

(3)

95-357

No. 95-55

Supreme Court, U.S.
FILED
SEP 29 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

PAMELA HOUSTON,

Petitioner,

vs.

ALL SAINTS HEALTH SYSTEM, INC., JENNY McNEIL and DR. KENNETH PEARCE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT DR. KENNETH PEARCE

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25 pp

QUESTIONS PRESENTED

1. Whether Petitioner presented sufficient summary judgment evidence to create a genuine issue of material fact of an employer/employee relationship with Dr. Pearce.

2. Whether Petitioner presented sufficient summary judgment evidence to create a genuine issue of material fact that Dr. Pearce was an agent of All Saints with respect to its employment practices.

3. Whether Petitioner filed a timely EEOC charge against Dr. Pearce.

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APPENDIX

Appendix A — Charge of Discrimination 1a

Appendix B — Determination Letter Dated June 3, 1993 . 5a

STATEMENT OF THE CASE

Respondent provides the following information to correct inaccuracies and omissions in the Petitioner's statement.

A. Dr. Pearce Was Not An Employer, Employment Agency Or Labor Organization.

Petitioner's Second Amended Complaint alleged that at all times material to this action she was employed by Respondent All Saints Health Care, Inc. as a registered nurse. (R. 190-91). In the Joint Pre-Trial Order the Petitioner contended that she was discharged from her employment for filing a claim for workers' compensation benefits and for filing a discrimination charge with the Equal Employment Opportunity Commission. (R. 1292). Petitioner further contended that she was discriminated against in her employment by Respondent hospital in connection with her merit raise, work breaks, 24-hour drug audit, pushing stretchers, completion of charts and funeral leave. (R. 1292). Among the Established Facts in the Joint Pre-Trial Order was the statement that Petitioner Pamela Sue Houston was an employee of and worked at Respondent All Saints Episcopal Hospital from April, 1984 to August 21, 1991. (R. 1296; *see also* Supp. Joint P-T Order, R. 1453). In contrast, there are no allegations, contentions or Established Facts that Petitioner was an employee of Dr. Kenneth Pearce, that Dr. Pearce was an employer, employment agency or labor organization or that Dr. Pearce was an agent of Respondent hospital with respect to its employment practices.

B. Dr. Pearce Was Not Named As An Employer Who Discriminated Against Petitioner In Her EEOC Charge Of Discrimination.

Petitioner's statement inaccurately represented that an EEOC charge of discrimination was filed against Dr. Pearce and that the EEOC had issued a determination letter identifying Dr.

Pearce as a discriminating or responding party to Petitioner's Title VII allegations. (Pet. for Writ, p. 8). Instead, the only employer, labor organization or employment agency listed in Petitioner's EEOC charge of discrimination was All Saints Hospital. (R. 578; A.1). The Joint Pre-Trial Order and Supplemental Joint Pre-Trial Order identified as Established Facts that the only employer named or identified in the EEOC charge as the employer who discriminated against Petitioner was All Saints Hospital. (R. 1298, 1455). Moreover, Petitioner's answer to Interrogatory No. 9 confirmed that the only charge of discrimination she had filed was against All Saints Hospital and that it resulted in a finding on June 3, 1993 by the Fort Worth Human Relations Commission that ". . . there was reasonable cause to believe that All Saints had violated the law." (R. 800-01, 841).

There was neither a charge of discrimination filed with the EEOC by Petitioner nor a determination letter issued by the EEOC identifying Dr. Pearce as a discriminating or responding party to Petitioner's Title VII allegations. Instead, the determination letter dealt exclusively with Petitioner's charge of discrimination against All Saints Hospital and its determination concerning the employment relationship between Petitioner and All Saints. (R. 841- 42; App. 5a-7a). Dr. Pearce was neither named in the determination letter nor was he copied on it. *Id.*

Among the Agreed Contested Issues of Law stated in the Joint Pre-Trial Order and Supplemental Joint Pre-Trial Order was whether Dr. Pearce can be held liable to Petitioner under Title VII and/or 42 U.S.C. § 1981. (R. 1310, 1475). The trial court determined that Petitioner did not have a 42 U.S.C. § 1981 action against Dr. Pearce as a matter of law and Petitioner has not challenged this ruling on appeal. Further, the trial court held that Petitioner did not have a Title VII cause of action against Dr. Pearce as a matter of law because Dr. Pearce was not an employer,

employment agency or labor organization with respect to Petitioner and there was no summary judgment evidence that Petitioner filed any EEOC charge, much less a timely charge, against Dr. Pearce. (R. 1487-88).

SUMMARY OF THE ARGUMENT

The summary judgment was granted in favor of Dr. Pearce because Dr. Pearce is not subject to liability under Title VII. Petitioner did not present sufficient summary judgment evidence to create a genuine issue of material fact of an employer/ employee relationship with Dr. Pearce. Instead, Petitioner stipulated in the Joint Pre-Trial Order and Supplemental Joint Pre-Trial Order that she was employed at all relevant times by Respondent hospital and that she did not have an employment contract with either Dr. Pearce or Anesthesia Care, Inc. Title VII applies to employers, employment agencies and labor organizations.

Further, the summary judgment evidence does not reflect the existence of a genuine issue of material fact as to whether Dr. Pearce functioned as an agent of her employer with respect to employment practices. No evidence was presented that All Saints delegated any employment decisions to Dr. Pearce or that he had any input regarding her employment conditions.

Furthermore, Dr. Pearce is not subject to liability under Title VII because Petitioner did not timely file an EEOC charge of discrimination against him, which is a prerequisite to any such action in district court. The only charge of discrimination filed by Petitioner with the EEOC was against the Respondent hospital, her employer. Consequently, the only determination letter issued in connection with Petitioner's EEOC charge dealt exclusively with her employment relationship with All Saints and it in no way implicated, identified or informed Dr. Pearce of a charge or

determination of discrimination prior to the filing of Petitioner's complaint against him in federal district court. For these reasons, the Fifth Circuit Court of Appeals' decision affirming the summary judgment of the trial court should be left undisturbed.

REASONS FOR DENYING THE WRIT

I.

THE SUMMARY JUDGMENT IN FAVOR OF DR. PEARCE SHOULD BE LEFT UNDISTURBED BECAUSE PETITIONER DID NOT PRESENT SUFFICIENT EVIDENCE TO CREATE A GENUINE ISSUE OF MATERIAL FACT OF AN EMPLOYER/EMPLOYEE RELATIONSHIP WITH DR. PEARCE.

The party moving for summary judgment has the initial responsibility of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett,* 477 U.S. 317, 326, 106 S. Ct. 2548, 2552 (1986); *Harbor Ins. Co. v. Trammell Crow Co.,* 854 F.2d 94, 98 (5th Cir. 1988), *cert. denied,* 489 U.S. 1054, 109 S. Ct. 1315 (1989). Thus, the party seeking summary judgment has the initial burden of informing the district court of the basis for its motion, and of identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2552-53.

The extent to which a moving party must satisfy this burden depends upon whether the movant bears the burden of proof at trial on the issue or issues upon which it is seeking summary judgment. If the moving party bears the burden of proof on a claim or defense upon which it is moving for summary judgment,

it must come forward with evidence that establishes all of the essential elements of the claim or defense. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986). In contrast, where, as here, the non-movant bears the burden of proof at trial, the movant may discharge its burden by pointing out to the court that there is an absence of evidence to support the non-movant's case. *Celotex*, 477 U.S. at 325, 106 S. Ct. at 2553-54; *International Ass'n. of Machinists and Aerospace Workers, AFL-CIO, Lodge No. 2504 v. Intercontinental Mfg. Co.*, 812 F.2d 219, 222 (5th Cir. 1987). The moving party in such a case is not required to produce evidence to negate the opponent's claims. *Latimer v. Smithkline & French Laboratories, A Div. of Smithkline Beckman Corp.*, 919 F.2d 301, 303 (5th Cir. 1990). For that reason, there is no burden on the moving party to support its motion with affidavits or other similar materials where the non-movant will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2552-53. Rather, the movant need only demonstrate that the evidence which does exist does not "present a sufficient disagreement to require submission to a jury." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52, 106 S. Ct. 2505, 2511-12 (1986).

Once the movant has carried its burden, the burden shifts to the non-movant to show that summary judgment should not be granted. *Latimer*, 919 F.2d at 303. Once the movant has made the required showing, the non-movant must go beyond the pleadings and provide proof of specific facts showing a genuine issue for trial. *Celotex*, 477 U.S. at 324, 106 S. Ct. at 2553. Moreover, the affirmative evidence produced must create a fact issue concerning the existence of every component of the non-movant's case; naked assertions of an actual dispute unsupported by facts will not suffice, nor will the mere allegations of the pleadings. *Dunn v. State Farm Fire & Cas. Co.*, 927 F.2d 869, 872 (5th Cir. 1991); *Dennis v. General Imaging, Inc.*, 918 F.2d 496, 499 (5th Cir. 1990) (adopting district court's opinion). To the contrary, the evidence introduced by the non-movant must have

significant probative value. *Anderson,* 477 U.S. at 249-50, 106 S. Ct. at 2510-11.

Petitioner alleged that Dr. Pearce is liable for racial and sexual discrimination under §§ 703(a), 704 and 706 of Title VII of the Civil Rights Act of 1964. However, Title VII applies only to discrimination by employers, employment agencies, and labor organizations. To illustrate, § 703(a) states:

> It shall be an unlawful employment practice for an *employer*—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect of his compensation, terms, conditions, or privileges of *employment,* because of such individual's race, color, religion, sex, or national original; or
>
> (2) to limit, segregate, or classify *his employees or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his *status as an employee,* because of such individual's race, color, religion, sex, or national original.

In addition, Section 704 states:

> (a) it shall be an unlawful *employment practice* for an employer to discriminate against any of *his employees* or applicants for employment, for an employment agency or

joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice, made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in any investigation, proceeding, or hearing under this title.

(b) It shall be an unlawful employment practice for an *employer,* labor organization, employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to print or cause to be printed or published any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, or relating to admission to, or employment in, any program established to provide apprenticeship or other training by such a joint labor-management committee indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin, except that such a notice or

> advertisement may indicate a preference, limitation, specification or discrimination based on religion, sex or national original is a bona fide occupational qualification for employment. (Emphasis added).

The determination of an employment relationship is a two-step process. The first step is satisfaction of the definition of "employer" under § 701(b) of Title VII as a "person engaged in an industry affecting commerce who has 15 or more employees." The parties agree that Dr. Pearce meets the Title VII statutory definition of employer by virtue of employing 15 or more certified registered nurse anesthetists to assist him at the hospital. However, the summary judgment evidence failed to show that an employment relationship existed between Petitioner and Dr. Pearce, thereby defeating her efforts to have Dr. Pearce classified as her employer for Title VII purposes. *See Deal v. State Farm County Mut. Ins. Co. of Texas*, 5 F.3d 117, 118 n. 2 (5th Cir. 1993) citing *Fields v. Hallsville Indep. Sch. Dist.*, 906 F.2d 1017, 1019 (5th Cir. 1990), *cert. denied* 498 U.S. 1026, 111 S. Ct. 676, 112 L. Ed. 2d 668 (1991).

Petitioner failed to present summary judgment evidence to satisfy the "hybrid economic realities/common law control test." *Id.* at 118-19. The economic realities component of the test has focused on whether the alleged employer paid the individual's salary, withheld taxes, provided benefits and set the terms and condition of employment. *Id.* at 119; *Mares v. Marsh*, 777 F.2d 1066, 1068 (5th Cir. 1985). The control component of the test examines whether the alleged employer has the right to hire and fire, to supervise the individual's work, and to set the individual's work schedule. *Deal*, 5 F.3d at 119; *Fields*, 906 F.2d at 1019-20. The right to control and direct a person's work is the most important aspect of the control component. *Fields*, 906 F.2d at 1019.

In the case at bar, the affidavit of Kenneth Pearce, M.D. and the deposition of Petitioner Pamela Houston establish that Pamela Houston is not and never has been employed by either Kenneth Pearce, M.D. or his employer, Anesthesia Care, Inc. Rather, the affidavit of Kenneth Pearce, M.D. and the deposition of Pamela Houston further established that neither he nor his employer, Anesthesia Care, Inc., had any responsibility to control, direct or supervise the details and manner in which Pamela Sue Houston performed her job duties; nor did Dr. Pearce or Anesthesia Care, Inc. have the right or responsibility to hire, promote, set her work schedule and/or terminate Petitioner's employment.

To the contrary, Petitioner testified by deposition and stipulated in the Joint Pre-Trial Order and Supplemental Joint Pre-Trial Order that at all times material to this action she was employed by Respondent All Saints Hospital and that she did not have an employment contract with Dr. Pearce or Anesthesia Care, Inc. (R. 1296, 1453). Petitioner also stipulated that Dr. Pearce did not set her working hours, formulate or play any role in the attendance policy she was required to follow, or set the break schedule during her shift. (R. at 1466). Further, Petitioner stipulated that Dr. Pearce did not have the authority to terminate any employee of All Saints, did not order or require Petitioner to complete the drug count for the medicine box in the holding room, did not order or request that Petitioner identify patients upon their arrival in the holding room and never evaluated Petitioner's job performance for her annual review of merit pay increase. *Id.*

Furthermore, neither Dr. Pearce nor Anesthesia Care, Inc. provided wages, medical benefits, pension benefits, vacation pay or sick leave to Petitioner while she was employed at All Saints Episcopal Hospital. (R. 1468-69). Instead these benefits were provided to Pamela Houston by All Saints Hospital. (R. 1469).

Finally, Petitioner stipulated that Dr. Pearce did not request, order or otherwise compel Petitioner to push stretchers at any time and he did not play any role in the disposition of her workers' compensation claim or terminate her from her position with All Saints Hospital. *Id.*

The summary judgment evidence and applicable law is clear that Petitioner did not have an employer/employee relationship with Dr. Pearce and he is not subject to liability under Title VII. Even if Dr. Pearce was an employee of Petitioner's employer, All Saints Episcopal Hospital, he would not be subject to liability in his individual capacity. *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir. 1994); *Miller v. Maxwell's Int'l., Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied,* 114 S. Ct. 1049 (1994). Moreover, Petitioner presented no evidence that All Saints delegated any employment decisions to Dr. Pearce so that he could act as its agent. *Deal,* 5 F.3d at 119. Consequently, Dr. Pearce cannot be liable to Petitioner as an "employer" under Title VII and the district court's summary judgment should be left undisturbed.

II.

THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF DR. PEARCE BECAUSE PETITIONER DID NOT TIMELY FILE AN EEOC CHARGE AGAINST DR. PEARCE.

On October 15, 1991, Petitioner filed her Charge of Discrimination with the Equal Employment Opportunity Commission and the Fort Worth Human Rights Commission alleging that she had been harassed and discriminated against on the basis of her race. (A. 1-2). Petitioner stipulated in the Joint Pre-Trial Order and the Supplemental Joint Pre-Trial Order that the only employer named or identified in the Charge as the employer who discriminated against her was All Saints Hospital.

(R. 1298, 1455). The summary judgment evidence established that Petitioner has not filed a complaint with the EEOC or any local or state agency specifically naming Dr. Pearce as a discriminating party. (R. 711-14 [Pearce *Aff'd*]; App. 6a-7a Charge of Discrimination and Determination Letter; R. 800-01 [Pl. Int. Ans. No. 9]). Petitioner specifically filed charges of discrimination with the Fort Worth Human Relations Commission and the federal Equal Employment Opportunity Commission wherein Petitioner expressly named All Saints Hospital as the discriminating party. (A.1-2). Petitioner did not name Dr. Pearce as a discriminating party in this Charge of Discrimination or in any similar complaint. In addition, Dr. Pearce was not provided notice of the October 15, 1991 Charge of Discrimination or provided an opportunity to defend his interests. (R. 713)

Section 706(e) of Title VII provides that claimants such as Petitioner must file a Charge of Discrimination with the EEOC within 180 days of an act of discrimination. If, however, a party files a Charge of Discrimination with a state or local civil rights agency before filing with the EEOC, the party has 300 days in which to file a Charge of Discrimination with the EEOC. The 180-day/300-day limit serves as a judicial statute of limitations barring any subsequent civil suit with respect to a discriminatory incident occurring prior to the 180-day/300-day period. *See Zipes v. Transworld Airlines*, 455 U.S. 385, 393, 102 S. Ct. 1127, 1132 (1982); *Sosa v. Hiraoka*, 920 F.2d 1451, 1455 (9th Cir. 1990). Accordingly, Petitioner's claims of Title VII violations against Dr. Pearce are barred by the Title VII statute of limitations because Petitioner did not file a Charge of Discrimination against Dr. Pearce with the EEOC within the requisite 180/300-day time limit.

Petitioner has argued unsuccessfully on appeal that simply alluding to Dr. Pearce in the "Discrimination Statement" of the October 15, 1991 Charge of Discrimination against All Saints

Hospital, without providing him notice of the charge or an opportunity to defend himself, satisfies the requirement of § 706(e) of Title VII. A claimant is barred from suing a party not named in an EEOC complaint unless there is a clear identity of interests between the unnamed party and the party named in the EEOC complaint. *Way v. Mueller Brass Co.*, 840 F.2d 303, 307 (5th Cir. 1988); *see Romain v. Kurek*, 772 F.2d 281 (6th Cir. 1985). For example, parties may be considered to have a "clear identity of interests" if the unnamed party and the named party are co-owners of a company. *Romain*, 772 F.2d at 281. The summary judgment evidence does not establish a "clear identity of interests" between All Saints Hospital and Dr. Pearce. Even if the evidence showed that Dr. Pearce was an employee of All Saints, he would not be subject to individual liability. *Grant*, 21 F.3d 649; *Miller*, 991 F.2d 583, 587-88. Moreover, Petitioner's failure to provide Dr. Pearce with notice of the October 15, 1991 Charge of Discrimination and provide him with an opportunity to defend his interests, even if he had a "clear identity of interest" with All Saints Hospital, defeats the purpose of § 706(e) of Title VII and should not serve to satisfy the necessary condition precedent to liability.

CONCLUSION

The United States Court of Appeals for the Fifth Circuit was correct in affirming the district court's summary judgment in favor of Respondent Kenneth Pearce, M.D. Dr. Pearce is not subject to liability to Petitioner under Title VII of the Civil Rights Act of 1964 because he is neither an employer, employment agency or labor organization with respect to Petitioner's complaints of discrimination. Further, the summary judgment evidence does not reflect the existence of a genuine issue of material fact as to whether Dr. Pearce was Petitioner's "employer" for Title VII purposes.

Finally, the summary judgment should be left undisturbed because Petitioner did not timely file an EEOC charge against Dr. Pearce with notice to Dr. Pearce so that he would have an opportunity to appear and defend himself. A claimant is barred from suing a party not named in an EEOC complaint unless there is a clear identity of interest between the unnamed party and the party named in the complaint. In this regard, the summary judgment evidence does not establish a "clear identity of interest" between All Saints and Dr. Pearce.

For the reasons stated, the Judgment of the United States Court of Appeals for the Fifth Circuit should be left undisturbed with costs taxed to Petitioner.

Respectfully submitted,

KEVIN J. KEITH
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FOWLER, WILES, NORTON & KEITH, L.L.P.
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2711 N. Haskell
Dallas, Texas 75204
(214) 841-3000

APPENDIX A — CHARGE OF DISCRIMINATION

CHARGE OF DISCRIMINATION

ENTER CHARGE NUMBER
I FEPA 31A92019
I EEOC 31A920019

(State or local Agency, if any)
FORT WORTH HUMAN RELATIONS COMMISSION
and EEOC

NAME
Pamela Sue Houston

HOME TELEPHONE NO.
817/293-5473

STREET ADDRESS
3228 Bunkerhill Drive

CITY, STATE AND ZIP CODE
Fort Worth, Texas 76140

COUNTY
Tarrant

NAMED IS THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY, APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY WHO DISCRIMINATED AGAINST ME (If more than one list below.)

NAME
All Saints Hospital

Appendix A

NO. OF EMPLOYEES/MEMBERS
15+

TELEPHONE NUMBER
817/926-2544

STREET ADDRESS
1400 8th Avenue

CITY, STATE AND ZIP CODE
Fort Worth, Texas 76101

* * *

CAUSE OF DISCRIMINATION BASED ON

☒ *BLACK* Race

* * *

DATE MOST RECENT OR CONTINUING DISCRIMINATION TOOK PLACE
April 15, 1991 and continuing

THE PARTICULARS ARE

I. PERSONAL HARM:
A. Since April 15, 1991, I have been treated differently in the terms and conditions of my employment.

II. RESPONDENT'S REASON FOR ADVERSE ACTION:
A-1. I have been told by Ms. Jenny McNeil, Caucasian, Surgery Supervisor, that regardless of my 100% performance, I would be docked 1% of a merit raise due to my absences.

Appendix A

A-2. I have been told by Ms. Jenny McNeil, that I am to transport patients to their surgical rooms.

A-3. I have been told by Ms. Jenny McNeil that it is a shame that Dr. Kenneth Pierce, Caucasian, Physician, continues to subject me to racial slurs and a racially harassing atmosphere.

III. DISCRIMINATION STATEMENT:
I believe that I have been discriminated against because of my race, Black, in violation of Title VII of the Civil Rights Act of 1964, as amended, and the City of Fort Worth's Fair Employment Ordinance No. 7278, as amended, because:

A-1. On or about April 15, 1991, I was informed that my merit pay increase would only be for 3% due to my absences even though I had scored 105% on my Employee Performance Evaluation score sheet. I am aware of Caucasian RNs whose excessive absences have never been a problem even though their non-attendance is in clear violation of written policy.

A-2. Since May 17, 1991, I have been forced to push hospital bed stretchers. Surgical Orderlies normally push patients as part of their job duties. As an RN, I protested these forced duties. Caucasian RNs are not treated this way.

A-3. I have made repeated complaints to my supervisor, Ms. Jenny McNeil about Dr. Pierce's racial slurs, racial jokes, and in general the racially harassing atmosphere that he has subjected me to. Ms. McNeil's response was that it is a shame that Dr. Pierce is that way. No action has even been taken to correct Dr. Pierce's behavior.

Appendix A

☒ I also want this charge filed with the EEOC. I will advise the agencies if I change my address or telephone number and I will cooperate fully with them in the processing of my charge in accordance with their procedures.

I declare under penalty of perjury that the foregoing is true and correct.

s/ *Pamela Houston*
Charging Party (*Signature*)
Date *October 15, 1991*

NOTARY
s/ *Raul Duran*
I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

SIGNATURE OF COMPLAINANT
s/ *Pamela Houston*
SUBSCRIBED AND SWORN TO BEFORE ME THIS DATE
(Day, month, and year)
15-10-91

APPENDIX B — DETERMINATION LETTER DATED JUNE 3, 1993

CITY OF FORT WORTH, TEXAS
Certified Return Receipt
#P 374 691 856

HUMAN RELATIONS COMMISSION
1000 THROCKMORTON STREET
FORT WORTH, TEXAS 76102

June 03, 1993

Ms. Pamela Sue Houston
3228 Bunkerhill Drive
Fort Worth, Texas 76140

Re: Pamela Sue Houston vs. All Saints Episcopal Hospital
HRC Charge No. 31A92019
EEOC charge No. 31A920019
Date Filed: October 15, 1991
Date Served: October 17, 1991

DETERMINATION

Dear Ms. Houston:

Under the authority vested in me by Section 4, of the City of Fort Worth's Fair Employment Ordinance No. 7278, as amended, I issue on behalf of the Commission, the following findings as to the merits of the subject charge.

The timeliness, deferral and all other jurisdictional requirements having been met, the Respondent is an employer within the meaning of Employment Ordinance No. 7278 and Title VII.

Appendix B

The Charging Party alleges that the Respondent discriminated against her, in violation of the City of Fort Worth's Fair Employment Ordinance No. 7278, as amended, and of Title VII of the Civil Rights Act of 1964, as amended, because of her race, Black. Specifically, the Charging Party contends that her merit pay increase was only 3% due to her absences, even though she had scored 105% on her performance rating. The Charging Party contends she was treated differently in that she was required to push occupied bed stretchers and not relieved for breaks/lunch breaks. The Charging Party also contends she was subjected to a racially harassing atmosphere.

The Respondent's officials deny the allegations of discrimination and contend that the doctor who the charging Party accuses of racially derogatory statements was not an employee of theirs. The Respondent contends they have taken steps to raise individual physician awareness in the worksite concerning racial comments.

The findings indicate that a similarly situated Caucasian nurse received a 3% merit increase after being rated "E" in attendance and 55 points in performance. The Charging Party also received a 3% merit increase after being rated "E" in attendance, but with over 100 points in performance. The findings indicate the Charging Party returned from an on-the-job injury on May 31, 1991 with a doctor's recommendation to continue her duties and to obtain assistance with transporting stretchers if needed. The evidence indicates that the Charging Party was required to push occupied bed stretchers in spite of these doctor's requirements. Witness testimony indicates that no similarly situated non-Black comparables were pulled from their normal duties and required to push stretchers as the Charging party was. Witness testimony indicates that the Charging Party was not given assistance in pushing the occupied bed stretchers.

Appendix B

The evidence indicates that the Charging Party was treated differently than similarly situated non-Black employees in that she was not relieved for breaks/lunch breaks. The evidence also indicates that during July/August 1991, the Charging party complained to management of the racial comments/jokes made by a Caucasian doctor. Witness testimony supports the Charging Party's allegation regarding racially derogatory statements having been made by a Caucasian doctor with whom the Charging Party worked. No evidence was found to indicate that the Respondent took any action to correct these conditions prior to the Charging Party's complaint.

Examination of the evidence indicates that there is reasonable cause to believe the allegation to be true. No finding is made to any other issue raised, or which might be construed to have been raised by the subject charge.

Having determined that there is reasonable cause to believe that the law has been violated, I now invite the parties to join with the Commission in a collective effort toward a joint resolution of the matter and to eliminate unlawful employment practices. A representative of the Commission will contact each party in the near future to begin the conciliation process; until then, no action is required.

On Behalf of the Commission:

"S/ Michael D. Ivey"
Michael D. Ivey
Interim Executive Director
Forth Worth Human Relations Commission

MKI: lkw
cc: All Saints Episcopal Hospital file